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NO. 20728

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNARD KAPLAN; ALBERTO
BERUMEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS BERNARD KAPLAN
AND ALBERTO BERUMEN

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

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BERNARD KAPLAN and
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IN THE UNITED STATES COURT OF APPEALS
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BERUMEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS BERNARD KAPLAN
AND ALBERTO BERUMEN

STATEMENT OF CASE

On January 13, 1965, the United States commenced this action by filing a grand jury indictment in the United States District Court for the Southern District of California, Central Division. Said indictment was in five counts. Count One of the indictment charged appellants Bernard Kaplan and Alberto Berumen together with one Ronald N. Reinhardtsen of conspiring together to pass, utter, publish, or attempt to do so, counterfeited obligations of the United States in violation of Title 18, United States Code, Section 472. All of said parties were subsequently acquitted on this Count (Rep. Tr. p. 372, lines 11-12). Counts Two and Four of the

indictment charged appellant Berumen with unlawfully passing a counterfeit Federal Reserve Note in violation of Title 18, United States Code, Section 472; while Count Three made the same charge against defendant Reinhardtson and additionally charged appellant Kaplan with aiding, abetting, counseling, inducing and procuring the commission of defendant Reinhardtson's alleged offense. Count Five of the indictment charged appellant Kaplan and defendant Reinhardtson with a further violation of Title 18, United States Code, Section 472 - i. e. , possessing and concealing with intent to defraud six Federal Reserve Notes, all of which were counterfeit.

Following the posting of bail by appellants and by defendant Reinhardtson, on January 25, 1965, appellants were arraigned before the Honorable Charles H. Carr, District Judge. At the time of arraignment both of appellants were represented by Howard E. Beckler. Appellants' respective pleas, however, were continued until February 8, 1965, at which time appellant Kaplan pled not guilty to Counts One, Three, and Five of the indictment; while defendant Berumen pled not guilty to Counts One, Two and Four thereof. The matter was also set for trial at this time and appellants and defendant Reinhardtson were given permission to file any motions they deemed necessary.

Subsequently and on or about March 4, 1965, a Motion to Suppress certain evidence was filed on behalf of defendant Reinhardtson, which motion was subsequently joined in on behalf of defendant Kaplan (see Rep. Tr. p. 15, lines 6-23). On or about March 9, 1965, a Motion for Discovery and Inspection was filed on behalf of

appellants. The aforescribed Motion to Suppress was opposed by the government, while the Motion for Discovery and Inspection was partially opposed.

On March 15, 1965, the Honorable Jesse W. Curtis, District Judge, ordered the Motion to Suppress Evidence continued until the time of trial, and granted in part and denied in part appellants' Motion to Inspect.

On March 29, 1965, the date originally set for trial in this matter, appellants' attorney, Howard E. Beckler, made a Motion for a continuance in order to give him time to be relieved as counsel for appellant Bernard Kaplan on the grounds that there was a definite conflict of interest between appellants Kaplan and Berumen. Following proddings of the Court, however, attorney Beckler agreed to arrange for new counsel for appellant Kaplan and to have said counsel prepared for trial on the morning of the following day, March 30, 1965.

On this later date trial was in fact commenced before the Honorable William J. Lindberg, all parties to the action having waived trial by jury and special findings of fact. Despite Mr. Beckler's prior representation to the Court that he could not represent both of appellants because of the conflict in their respective interests and that he would have new counsel at the time of trial for appellant Kaplan, Mr. Beckler in fact represented both of appellants at the instant trial, after explaining to the Court that he believed that the conflict in question no longer existed.

During the course of the trial neither appellants nor

defendant Reinhardtson testified in their own behalf. Following denial of the Motion to Suppress Evidence and conclusion of the remainder of the trial, the Honorable William J. Lindberg found that none of the defendants were guilty as to Count One of the indictment (i. e. , there was no conspiracy); that defendant Reinhardtson was not guilty as to Counts Three and Five of the indictment; but that appellant Alberto Berumen was guilty as to Counts Two and Four of said indictment, while appellant Bernard Kaplan was guilty as charged in Counts Three and Five thereof. The time set for sentencing was continued to April 13, 1965, pending a pre-sentence report.

On this later date, appellant Kaplan was sentenced to a term of three (3) years each on Counts Three and Five of the indictment, which sentences were to run concurrently under Title 18, United States Code, Section 4208(a)(2). Appellant Berumen was also sentenced to three (3) years each on Counts Two and Four of the indictment to run concurrently under said Section. Subsequently and also on April 13, 1965, appellants Berumen and Kaplan filed Notices of Appeal in the instant matter, as well as application for bail pending appeal, which applications were granted. Appellant Berumen's Notice of Appeal was filed in *propria persona*.

Thereafter, on May 28, 1965, a Substitution of Attorneys, substituting Maurice C. Inman, Jr. in place of Howard E. Beckler was filed on behalf of appellants. All other documents necessary to perfect this appeal, including the designation of record on appeal,

were thereafter filed with this Court.

STATEMENT OF FACTS

A. Pre-Trial Proceedings.

As heretofore indicated, at all times following the arraignment of appellants on January 25, 1965, and up to the Substitution of Attorneys herein following the completion of trial and sentencing, appellants were represented jointly by Howard E. Beckler, attorney at law.

Prior to the time of trial herein and on March 15, 1965, appellants' Motion for Discovery and Inspection of certain documents and statements in the possession of the government was heard by the Honorable Jesse W. Curtis. Following argument on the Motion, Judge Curtis denied appellants the right to inspect the statements requested in numbers 5, 6 and 7 of said Motion (Rep. Tr. p. iv, line 25, p. v, lines 1-2). The statements so requested were any and all statements made by appellants Kaplan and Berumen and/or defendant Reinhardtsen at any time or place to officers of the United States with respect to the subject matter of the instant case, whether or not reduced to writing and/or signed by any of said defendants, as to which some form of recordation, note, or memorandum existed incorporating, embodying or reproducing the substance and content of said statement or statements. The statements of appellants were requested on the grounds that they were "unable to recall and relate to their counsel the full substance or

content of their statements and accordingly counsel requires the items and objects . . . to be able to evaluate defendants' [appellants'] positions with respect to this case, advise them concerning same, and prepare and develop their defense thereon." (See Motion for Inspection and Discovery, para. (5).)

On the date originally set for trial, March 29, 1965, attorney Beckler made a Motion on behalf of appellants - specifically appellant Kaplan - for a continuance predicated upon the grounds that on Saturday afternoon of the weekend immediately preceding trial (trial being held on Monday) he had had a final interview with both of appellants, and at that time was provided with certain information not previously given to him by defendant Kaplan, which established that there was a definite conflict of interest, at least in said attorney's mind, between the two appellants (Rep.Tr. p. viii, line 15- p. ix, line 2). Attorney Beckler further informed the Court that he made this Motion as an officer of the Court; that the Motion was not a "dilatory tactic" on his part; that the information was not something he could have previously ascertained; and that he was sure that such information would "inhibit" appellants' testimony (Rep.Tr. p. viii, line 25 - p. x, line 8).

Thereupon the Court inquired of attorney Beckler and appellant Kaplan whether a continuance until Thursday would aid in permitting appellant Kaplan to obtain new counsel. Both attorney Beckler and appellant Kaplan, however, questioned whether it would be possible to obtain and prepare new counsel by said date (Rep.Tr. p. x, lines 9-23). When counsel for the prosecution

indicated that the government was opposed to a continuance on the grounds that the same would greatly inconvenience a number of its witnesses, the Court then set trial for Thursday, April 1, 1965. Attorney Beckler, however, after first stating that he had other matters at that time and was otherwise engaged up to April 19, 1965 (see Rep. Tr. p. xiii, lines 5-13; p. xiv, lines 20-22), further stated that if the matter could not be continued until April 19, he would arrange for appellant Kaplan to have "competent prepared counsel" who would answer ready "today" [March 29, 1965] (Rep. Tr. p. xiv, lines 16-21). Thereupon the Court set the matter for trial on the following morning, March 30, 1965.

B. Evidence and Testimony at Trial.

1. Jury Waivers.

At the outset of the trial in the instant matter, appellants and defendant Reinhardtsen all orally and in writing advised the Court that they desired to proceed at trial without a jury. Both appellants Kaplan and Berumen stated that they had given the matter full consideration for a substantial period of time before making such waivers. Both the government's attorney, Mr. Balaban, and Mr. Beckler also consented to such waivers (Rep. Tr. pp. 1-9). At this stage in the proceedings, upon request of Mr. Balaban, attorney Beckler notified the Court that he believed the conflict problem which he had earlier raised was resolved because there was no longer a "contingency of a jury trial". Appellants concurred with

attorney Beckler's statement, stating that they had discussed the matter with him (Rep. Tr. p. 12, line 16 - p. 14, line 5).

2. Evidence Offered On Motion to Suppress.

Consideration of appellants' and defendant Reinhardtsen's Motion to Suppress in the instant case was deferred until time of trial. The evidence which appellants and defendant Reinhardtsen were attempting to suppress consisted of six (6) \$100 Federal Reserve notes which were purportedly counterfeit and the envelope in which the notes had been found. Said evidence had assertedly been found in the trunk of a 1963 Chevrolet automobile allegedly used by defendant Reinhardtsen.

Since the affidavits offered in support of the Motion and the government's testimony in this matter conceded the fact that no warrants had ever been issued for the arrest of either of appellants or defendant Reinhardtsen, nor had a search warrant ever been obtained to search said Chevrolet automobile, the government, by means of testimony of agent Robert L. Tomsic of the Secret Service, sought to establish legality of the seizure of the evidence in question.

Agent Tomsic testified, for purposes of establishing probable cause for the seizures and as evidence solely with reference to the Motion to Suppress (see Rep. Tr. p. 159, lines 12-16; p. 176, line 1 - p. 178, line 16), as follows:

On December 18, 1964, he had received a note to the effect that the Secret Service had received a call from the United

California Bank to the effect that the bank had received a purportedly counterfeit \$100 Federal Reserve note which had been deposited to the account of G. R. Kirk Company in Los Angeles and that an employee from the Kirk Company had reported that the note had been given him by an individual who was operating a Christmas tree lot in Hollywood, California. The note had been presented for payment of Christmas trees, and the purchaser thereof was apparently driving a white 1963 or 1964 Chevrolet (see Rep. Tr. p. 162, line 9 - p. 164, line 4). On the following day agent Tomsic reportedly became aware that a person by the name of Alberto Berumen had been arrested by the Los Angeles Police Department for attempting to pass a counterfeit \$100 Federal Reserve note and that Mr. Berumen operated a Christmas tree lot in Hollywood, California. Subsequently on the same day agent Tomsic and agent Hess of the Secret Service took appellant Berumen into custody and ultimately went to the Christmas tree lot and then to the G. R. Kirk Company. Agent Tomsic went into the Kirk Company office at which time he was purportedly informed that the man who had given the allegedly counterfeit note for the previous Christmas tree purchase was then leaving the lot. Agent Tomsic noted that the individual referred to was seated in a white 1963 Chevrolet, and he then immediately proceeded outside to said automobile, assertively identified himself as a Secret Service agent, and requested the occupant to come back inside the office with him.

The occupant, defendant Reinhardtson, identified himself, admitted he had used a \$100 bill to pay for certain purchases at the

G. R. Kirk Company, but did not know the identity of the individual from whom he had received the bill, except that it was a customer at his Christmas tree lot; denied any knowledge that he had given a counterfeit bill; requested information from agent Tomsic as to whether he was under arrest; was then searched by agent Tomsic; and was, at this point, apparently told the next statements which he made could be used against him. When questioned about the Chevrolet automobile which was allegedly parked immediately adjacent to the office, defendant Reinhardtsen purportedly stated that the automobile belonged to a "Bernard Kaplan" and that Mr. Kaplan had been driving him the day on which the \$100 bill had been passed (Rep. Tr. p. 172, line 1 - p. 173, line 19).

Agent Tomsic further testified that defendant Reinhardtsen was then placed in the Federal agents' automobile along with appellant Berumen and that he, agent Tomsic, took the keys to the Chevrolet automobile, and after being informed that if said automobile was to remain on the Kirk Company premises, it would have to be moved out of the way, drove the automobile to a spot at the end of the lot, made a brief search thereof, and locked it. Agent Tomsic, at this time, allegedly informed defendant Reinhardtsen that the Chevrolet automobile "was going to be seized as the car had been used to carry a \$100 counterfeit note" (Rep. Tr. p. 174, lines 1-15).

Subsequently, agents Hess and Tomsic, together with appellant Berumen and defendant Reinhardtsen proceeded to the Los Angeles office of the Secret Service, and at some time

thereafter the keys to the aforementioned Chevrolet automobile were allegedly given by agent Tomsic to two other members of the Secret Service who were to pick up the automobile and bring it to the federal garage where they were to search it and then return the keys to agent Tomsic (Rep. Tr. p. 174, line 17 - p. 175, line 2). Further testimony elicited from agent Tomsic was to the effect that on December 20, 1964, he personally searched the automobile at the federal garage and discovered in a box located in the trunk thereof the envelope and six \$100 Federal Reserve notes which were the subject of the Motion to Suppress.

Other material testimony which was offered and which bears upon said Motion was to the effect that the bill which had been passed at the Kirk Company lot on December 17th in payment for Christmas trees had not been examined by any Secret Service agents or any other counterfeit experts until December 22nd (see Rep. Tr. p. 132, line 17), and that the method which had been used by the United California Bank to ascertain whether the bill was counterfeit was merely that the numbers thereon matched a list of purportedly counterfeit bills which was issued to branches of the bank by its operations office (Rep. Tr. p. 128, line 23 - p. 129, line 7). No investigation was made prior to the 22nd which would tend to show that the note in question was not the real note which had been used as a basis for counterfeit copies.

3. Evidence Offered at Trial on
Substantive Issues.

There was evidence offered at trial to the effect that on December 6, 1964, a counterfeit \$100 Federal Reserve note was passed at the Food Giant Market located at Hollywood Boulevard in Hollywood, California and that appellant Berumen had allegedly passed said counterfeit note. Additionally, evidence was offered to the effect that on December 19, 1964, appellant Berumen had also passed a counterfeit \$100 Federal Reserve note to an employee of Ralph's Market located on Sunset Boulevard in Los Angeles, California.

Other evidence offered at trial tended to show that on December 17, 1964, defendant Reinhardtson had passed a counterfeit \$100 Federal Reserve Note to an employee of the G. R. Kirk Company in downtown Los Angeles; that defendant Reinhardtson was subsequently arrested by Agent Tomsic on December 19, 1964, at the Kirk Company lot; that the automobile defendant Reinhardtson had in his possession at the time of arrest was sometime thereafter moved to the federal garage; and that on December 20, 1964, Agent Tomsic discovered six (6) counterfeit \$100 Federal Reserve Notes located in an envelope in the trunk of said automobile. The notes and envelope in question were admitted into evidence following denial of appellants' and defendant Reinhardtson's Motion to Suppress and over their objections to the introduction of said evidence (Rep. Tr. p. 318, line 7 - p. 319, line 12).

Other evidence offered was to the effect that appellant Kaplan was apparently with defendant Reinhardtson at the Kirk

Company lot on December 17, 1964, when the purchase of trees was made with a counterfeit \$100 Federal Reserve Note; that the Chevrolet automobile in which the six (6) counterfeit notes and envelope heretofore mentioned had been discovered was apparently leased to and/or in the general possession of appellant Kaplan; and that on December 20, 1964, subsequent to the search of said car and discovery of said evidence, appellant Kaplan acted suspiciously while attempting to remove certain of his personal property from said Chevrolet automobile.

ARGUMENT

I

APPELLANTS WERE DEPRIVED OF "ASSIST-
ANCE OF COUNSEL" WITHIN THE MEANING
OF THE SIXTH AMENDMENT TO THE CON-
STITUTION DUE TO AN INHERENT CONFLICT
WHICH EXISTED WITH RESPECT TO EACH OF
THEIR INTERESTS.

It is well established that the right to counsel in criminal cases has a high place in the scheme of procedural safeguards of our courts and that it is the solemn duty of the Trial Judge to make certain that representation of an accused by counsel is not an empty gesture, but is the fulfillment of the spirit and purpose of the Constitutional Mandate.

Cicenia v. LaGay, 357 U.S. 504, 78 S.Ct. 1297,

2 L. Ed. 2d 1523 (1958);

Gadsen v. United States, 223 F.2d 627, 96 U.S.

App. D.C. 162 (1955);

United States Constitution, Sixth Amendment.

Moreover, as a defendant in Federal Court is entitled under the Sixth Amendment to the Constitution to the assistance of counsel for defense, where he is able to obtain counsel for himself he must be given reasonable time and a fair opportunity to secure such counsel of his own choosing.

United States v. Bentvena, 319 F.2d 916 (4th Cir.

1963), cert. denied, 375 U.S. 940, 84 S.Ct.

345, 11 L. Ed. 2d 271 (1964).

The Constitution assures a defendant effective representation by counsel whether the attorney so chosen is one of defendant's own choosing or is Court appointed.

Craig v. United States, 217 F.2d 355 (6th Cir. 1955);
Holland v. Boles, 225 F.Supp. 863 (D. C. West Va.
1963).

Undivided loyalty of counsel is, of course, essential to due process, just as the right of assistance of counsel means effective assistance. There cannot be effective assistance if there is a conflict of interest or if reasonable opportunity to prepare for such representation has not been granted.

See: MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960),
Modified 289 F.2d 928, cert. denied
368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78
(1961);

Linden v. Dickson, 287 F.2d 55 (9th Cir. 1961);
United States v. Yodock, 224 F.Supp. 877
(D. C. Pa. 1963);

United States Constitution, Sixth and Fourteen
Amendments.

Perhaps the leading case dealing with the right to counsel and the adequacy of representation thereby is that of Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), rehearing denied, 315 U.S. 827, 62 S.Ct. 629, 86 L.Ed. 1222 (1942). In Glasser, supra, the Supreme Court pointed out that "assistance of counsel" is guaranteed by the Sixth Amendment to the Constitution,

which contemplates that such assistance be untrammelled and unimpaired by a court and that a court should not permit one lawyer to represent defendants with conflicting or potentially conflicting interests.

See: Glasser v. United States, 315 U. S. 60, 76.

Factually what transpired in Glasser was that Glasser and several other defendants were accused of defrauding and attempting to defraud the United States. Glasser, an attorney, hired several attorneys to represent him in his defense. One of these attorneys was a Mr. Stewart. Another defendant, also an attorney, had a difference of opinion with his counsel during the time of trial and notified the court that he did not wish this counsel to proceed in his behalf at the trial, but rather desired other counsel. Thereupon the trial judge inquired of Mr. Stewart if he would represent the second defendant along with Mr. Glasser. Glasser, however, personally objected to the appointment on the grounds he "would like to have my [his] own lawyer representing me [him]" (315 U. S. 60, 69). After further discussion, Stewart agreed to represent both the other defendants and Glasser, the court making such appointment and there being no further objection from either Glasser or any counsel representing him. The Supreme Court, in reversing Glasser's conviction stated that it is,

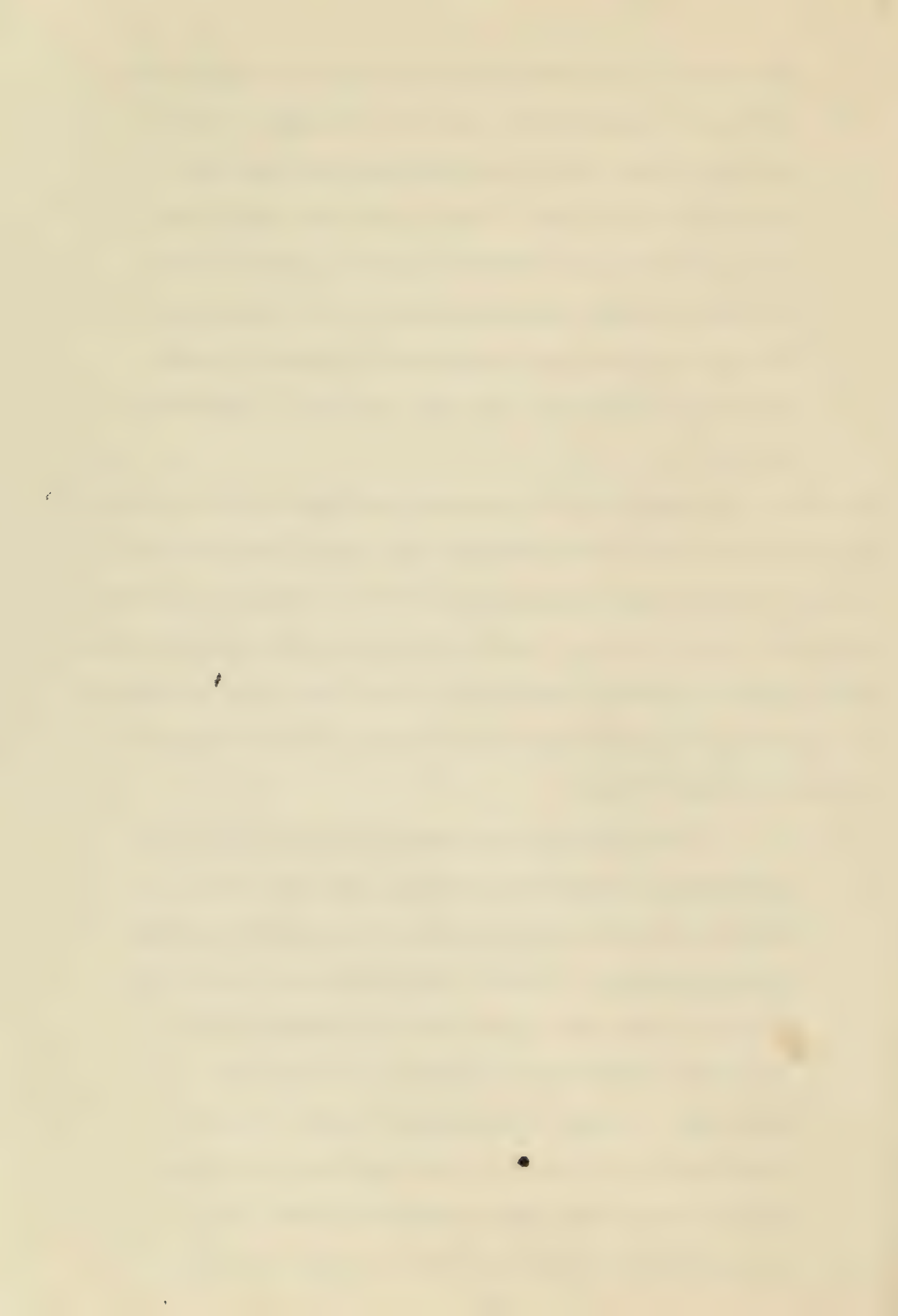
" . . . upon the trial judge [that] the duty of seeing the trial is conducted with solitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance



of counsel. This protecting duty imposes a serious and a weighty responsibility upon the trial judge of determining whether there is an intelligent and confident waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial judge, and it would be fitting and appropriate for that determination to appear upon the records [citation]." (315 U. S. 60, 71).

The Court concluded there had been no intelligent waiver of right to counsel in the case and that Glasser was denied "assistance of counsel", holding that the potential conflict of interest warranted reversal. In so holding, the Court laid down the guide line that some actual or potential conflict in interest must be shown before an inadequacy of counsel can be established. The Court stated, however, at page 76 that,

"[t]he right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. [citation]. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from . . . insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that diversion is brought home to



the court." (emphasis added).

See also:

Craig v. United States, supra, 217 F.2d 395
(6th Cir. 1955);

Holland v. Boles, supra, 225 F.Supp. 863
(D. C. West Va. 1963).

In the instant case, the record is clear that on March 29, 1965, at the original time for trial, attorney Beckler, appearing for both of appellants, moved for a continuance in order to permit appellant Kaplan adequate time to obtain new counsel due to a potential conflict of interest between appellants Kaplan and Berumen. Attorney Beckler informed the court as follows:

"On Saturday afternoon of the past week, day before yesterday, I had a final interview with Bernard Kaplan and Mr. Berumen in my office. At this time I learned some information that was given me . . . by Mr. Kaplan that I did not previously possess which indicated to my mind . . . as an officer of this court, that there is a definite conflict of interest between the two defendants Beruman and Kaplan.

"I might say, your Honor, that this is not a dilatory tactic . . . I am ready as far as Mr. Berumen and had I not learned this information I would be ready as far as Mr. Kaplan." (emphasis added) (Rep. Tr. p. viii, line 20 - p. ix, line 10).

Attorney Beckler went on to inform the court that "I cannot honestly and in good conscience represent both defendants" (Rep. Tr. p. ix, lines 16-17), and that,

"This information was not something I could have obtained . . . and it will be paradoxical between Mr. Berumen and Mr. Kaplan.

"It will inhibit their testimony and it creates, in short, conflict." (Rep. Tr. p. ix, line 24 to p. x, line 8).

When queried further concerning the conflict Attorney Beckler stated that the conflict arose apparently out of his ascertaining facts pertaining to certain statements Mr. Kaplan had previously made, which statements were "extremely essential to the defense of Mr. Berumen" (See Rep. Tr. p. xii, lines 1-14).

Subsequently, when the court refused to continue the matter beyond April 1, at 9:30 A.M. (See Rep. Tr. p. xiv, lines 20-22), attorney Beckler informed the court as follows:

"Your Honor, I can arrange for Mr. Kaplan to have competent prepared counsel and we can answer ready today." (Rep. Tr. p. xiv, lines 16-18),

Mr. Beckler's refusal to have the matter continued until Thursday was apparently predicated upon his being engaged at that time as well as at all other times up to April 19, 1965 (See Rep. Tr. p. xiii, lines 8-13; p. xiv, lines 21-22).

The matter was accordingly set for trial on the morning of

the following day, March 30, 1965.

Examining the above described statements of Attorney Beckler in light of the aforementioned legal rules concerning "assistance of counsel", there would appear to be little question but that Attorney Becker, an officer of the court, had established from information provided to him by his clients that there was a definite conflict of interest should he continue to represent both of them. Although the court did voice some suspicion concerning the request for a continuance, it is clear from Attorney Becker's statements that he felt a genuine concern that there was such a conflict after new evidence had been furnished to him by appellant Kaplan and that this evidence would definitely inhibit the defense of appellant Berumen. Attorney Beckler was, of course, the only person in a position to make such determination, since he had the benefit of privileged disclosure by his clients to him. Accordingly, there is no question under the above facts that if Attorney Beckler had at this stage continued to represent appellants the record would unquestionably indicate that appellants were denied "the assistance of counsel" guaranteed by the Sixth Amendment because of said attorney's representation of potential conflict of interest.

Glasser v. United States, supra, 315 U.S. 60, 76.

As previously indicated, however, other proceedings did transpire. On the date reset for trial, March 30, 1965, court was convened without new counsel being substituted for either of appellants in place of Mr. Beckler. Thereafter, appellants both orally and in writing advised the trial judge that they desired to proceed

to trial without a jury. Both Mr. Kaplan and Mr. Berumen stated they had given the matter full consideration for a substantial period of time before making such waivers. After counsel also consented to such waivers, the court permitted same. It was at this stage of the proceedings that Attorney Beckler notified the court that he believed that the conflict problem which he had earlier raised had been resolved because there was no longer a "contingency of a jury trial". The court then inquired of appellants as follows:

"THE COURT: Very well, I will inquire of Mr. Kaplan, are you aware of that position?

"MR. KAPLAN: Yes, your Honor.

"THE COURT: That might have been of some moment in the event of a jury trial, and you have discussed that fully?

"Mr. KAPLAN: Yes, we have resolved anything that might have come up.

"THE COURT: Do you feel you have been fully advised as to all matters and you are fully satisfied then to proceed in trial with Mr. Beckler?

"MR. KAPLAN: Yes, I sure have.

"THE COURT: Mr. Berumen, I would like to ask the same thing of you. You understood this?

"MR. BERUMEN: Yes, we talked it out and it is all straightened out.

"THE COURT: You think now that without a jury trial there would be no occasion for any conflict

or any conflict of any moment?

"MR. BERUMEN: That is right.

"THE COURT: And you are quite willing at this time to proceed in trial, represented by Mr. Beckler, having in mind that he also represents Mr. Kaplan?

"MR. BERUMEN: Yes, sir." (Rep. Tr. p. 13, line 8 to p. 14, line 5).

Summarizing the testimony at trial dealing with the instant issue, it is clear that Attorney Beckler had knowledge of an actual conflict, stated he would procure new counsel for one of the appellants because of said substantial conflict, did not apparently procure such counsel, but instead stated to the court that the conflict had apparently been resolved because of the waiver of a jury trial. Appellants, relying on Attorney Beckler's advice, agreed to continue with him as their counsel. Under such circumstances the question before this Court is two-fold - i. e., namely (1) whether the actual or potential conflict described by Mr. Beckler on March 29, 1965, could be resolved by the waiver of trial by jury and (2) whether, if the conflict did still exist at this stage, appellants waived their right to now question same by reason of their statements to the court.

Dealing with this latter question first, it is well established that the ultimate issue as to whether a defendant competently waived his right to counsel is whether he knowingly and intelligently chose

to do so.

See: United States v. Smith, 337 F.2d 49

(4th Cir. 1964).

From a brief perusal of both appellants' applications for setting of bail pending appeal it is clear that neither of appellants have any legal training or are capable of making legal decisions without the advice of counsel. Unquestionably, from their testimony they relied solely upon Attorney Beckler's advice. Under these circumstances there was certainly not an "intelligent, confident waiver" within the meaning of the Glasser case, supra, if in fact a conflict in interests did exist.

Turning to the question of whether the conflict in question was resolved by the fact that a jury trial had been waived, it seems inconceivable that there could be any testimony concerning statements of one of the appellants which would create a conflict of interest only in the event of a jury trial. In fact, Judge Lindberg even pointed out to appellants at the time of their jury waivers that where there are such waivers the trial judge sits as the trier of fact, instead instead of twelve separate triers of fact, and that the likelihood of conviction is just as great or greater at a trial by court as opposed to a jury trial (See Rep. Tr. p. vi, lines 3-13; p. x, line 3 to p. xi, line 7).

Although it can only be conjecture at this time as to the nature of the information conveyed by appellant Kaplan to Attorney Beckler on the Saturday preceding trial, it should be pointed out that the accusations concerning appellant Berumen dealt with the

passing of certain counterfeit \$100 dollar federal reserve notes and that appellant Berumen purportedly had been given sums in excess of \$100.00 by appellant Kaplan apparently as a part of a partnership purchase, prior to at least one of the alleged wrongful passings with which he was charged (See Rep. Tr. p. 239, lines 15-20; p. 265, line 19 to p. 266, line 8). Certainly, if in fact the counterfeit \$100 federal reserve note in question had been given by appellant Kaplan to appellant Berumen in payment for a portion of the partnership interests, appellant Berumen could have testified to same on the stand at trial. However, it would have been a clear conflict of interest for Attorney Beckler to have permitted such testimony against his other client, appellant Kaplan. While appellants admit that the record has not, and necessarily cannot, reflect what the actual conflict in interest was, appellants submit that Attorney Beckler acquainted the court with the fact that there was such a conflict. As was stated in Glasser, supra, under such circumstances there is a clear duty on the trial judge to be certain, before permitting counsel to represent clients with potentially conflicting interests, that there is no conflict.

While admittedly the Sixth Amendment to the Constitution does not require for its satisfaction that the actions of counsel result in a favorable outcome, but rather the requirement is met whenever the accused is supplied with counsel who exercises that judgment which might be expected of one trained in law and diligent to the application of its principles, the conduct herein of Mr. Beckler leaves some question as to whether the rights of appellants

were protected. Once Mr. Beckler was acquainted with the potential conflict in question he did properly notify the court thereof and request a continuance to permit one of the appellants to obtain new counsel and thus potentially alleviate the problem. When, however, the court would only agree to continue the matter to Thursday of the week in question, Mr. Beckler then stated that he was busy on that occasion, would otherwise be occupied with other matters for most of the month of April, would prefer to go to trial on the date originally set for trial (the same day he was making his Motion for a Continuance) on the premise he could obtain and adequately prepare other counsel by that afternoon to represent appellant Kaplan and be prepared for trial at that time. Attorney Beckler made such statements after first recognizing that it might not be possible for appellant Kaplan to obtain and have other counsel prepared even by Thursday of the week in question (See Rep. Tr. p. x, lines 9-23). In light of these facts Attorney Beckler's sudden change of mind concerning the previously mentioned potential conflict may well have been more influenced by his inability to procure other counsel and commitment to other clients, than by sound reasoning and judgment.

It is submitted that under such facts appellants were denied adequate assistance of counsel and that their convictions should be reversed.

II

APPELLANTS' CONSTITUTIONAL RIGHTS WERE
UNDULY PREJUDICED BY REASON OF THE
TRIER OF FACT'S EXAMINATION, WITHOUT
APPELLANTS' CONSENT OR REQUEST, OF
CERTAIN REPORTS COMPILED BY GOVERN-
MENT AGENTS PERTAINING TO THE INSTANT
PROSECUTION.

Under Title 18, United States Code, §3500, the defense has the right to make the demand for and receive the production of certain statements and reports of government witnesses. Sub-section (a) thereof provides that no such inspection or discovery is proper until such time as the government's witness testifies on direct examination in the trial of the case. Sub-section (b) provides:

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of defendant, order the United States to produce any statement . . . of the witness in possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it delivered directly to the defendant for his examination and use." (18 U.S.C. , §3500(b).) (Emphasis added.)

Sub-section (c) of §3500 states that if the United States makes a claim that any of the statements ordered to be produced under §3500 deal with matters not related to the subject matter of

the testimony of the witness, then the court is directed to inspect the statements and delete the objectionable portions. This section goes on to state:

"If pursuant to said procedure, any portion of such statement is withheld from the defendant and defendant objects to such withholding, and the trial is continued to adjudication of guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event defendant appeals, shall be made available to the appellate court for the purposes of determining the correctness of the ruling of the trial judge. "

Case law dealing with these so-called "Jencks Act" statements has made it clear that these statements are not to be procured until and unless counsel for defendant requests same.

See United States v. Tellier, 255 F.2d 441 (2nd Cir., 1958), certiorari denied, 358 U.S. 821, 79 S.Ct. 33, 3 L.Ed.2d 62 (1958).

As was stated in Mims v. United States, 332 F.2d 944 (10th Cir., 1964), at page 948,

" . . . the Jencks Act provides that after a witness called by the government has testified on direct examination, the court shall, on motion of defendant, require the government to provide any statement of the witness in possession of the government which relates to the subject matter of his testimony. (citation). "

The court in Mims, supra, further held that there was no duty on the trial judge, in absence of some form of request, to have the government present such statements to the court and that the court was not a cross-examiner and strategist for the defense; the rationale of the court being that counsel for the defense might be content to rest with whatever psychological advantage cross-examination without the use of such statements might bring forth.

In the instant case it is appellants' contention that the trial judge, who was also the trier of fact, acted improperly in examining the Jencks Act statements in question, since neither appellants nor co-defendant Reinhardtson made any motion to inspect or use such statements. Under such circumstances it is submitted that the reading of these statements, which contained substantial hearsay information and wherein it was alleged that appellants Berumen and Kaplan were felons (See United States Treasury Secret Service Treasury Department Report Form No. 1588, File No. J-4-3-CO-2344-11, dated February 2, 1965 and letter from Treasury Department to Manuel L. Real, dated January 5, 1965, bearing the aforementioned file number), was highly prejudicial.

What factually transpired in the instant trial which brought to light this error is that shortly after Agent Tomsic, Chief Prosecution Agent, took the stand on direct examination to present testimony in opposition to appellants' Motion to Suppress, and before testifying on direct examination on the substantive issues involved, counsel for all parties and the trial judge entered into the following discussion:

"MR. INMAN: May I inquire as to a separate matter of the court? Did Mr. Balaban present to the court a copy of Agent Tomsic's report?

"THE COURT: Let's see. There are three different documents here. One is a copy, I take it, of a letter addressed on the letterhead of the Treasury Department to Manual Real with a second sheet headed 'Details of Offense.'

"Now, that is one, and then there are three pages, and on the fourth page is a list of exhibits A, B, and C.

"Then there is another document which apparently is on a form and it is a report made by Robert Tomsic, and that is the Form 1588 of the United States Secret Service, Treasury Department.

"MR. INMAN: I am somewhat uninitiated in the handling of reports of this nature. Off the top of my head, your Honor, I would not think that it was proper. I would not think it proper for Mr. Balaban to have presented to the trier of fact in this particular action a copy of the Agent's report, which I have read and which contains a substantial amount of hearsay and things of this nature. Now, I really don't know what the proper procedure or practice is.

"THE COURT: Ordinarily, if it weren't for the Jencks Act, I wouldn't give any of it to you; but, anything that pertains to the Jencks Act goes to the court.

"MR. INMAN: That is the only point I have inquired about.

"THE COURT: You see, oftentimes the court has to rule on these matters as to whether or not they have been given to counsel.

"MR. INMAN: I knew that Mr. Balaban's voluntary delivery of the statements to us, which we appreciate, of course, under Jencks, is proper. I do not know whether under Jencks it was proper to give such reports to the trier of fact, your Honor.

"THE COURT: It usually goes to the trier of facts first; but, of course, the court is a trier without a jury. It doesn't change.

"MR. BECKLER: Can I address the court just in that regard, too? The only problem that is bothering me, your Honor, is that we didn't make a Jencks motion and therefore the court had no reason to rule on the admissibility of a witness' statement by virtue of 3500 US.

"THE COURT: These are merely statements for counsel to use in cross examination.

"MR. BECKLER: I understand that, your Honor, but I am wondering. When a Jencks problem arises, the court in camera usually reviews that to see which part the defense counsel will get. How about the academic problem where the question never arises?

Does the court then have the rightful authority to read these statements? I am wondering.

"MR. BALABAN: Your Honor, if I may interject one thing: Not only are the documents handed to the court for the purposes of seeing whether they should be turned over to defense counsel, but they also have to be previewed by the court in order to find out which witness the document is a statement about. In other words, the Jencks Act doesn't cover all things said about all people. At the same time I handed both defense counsel a copy, at the request of the court I handed the court a copy of the documents.

"MR. BECKLER: That is true when the Jencks problem arises, but it hasn't arisen yet and I am wondering if the court in reading these is somewhat premature. I have no motion even. I can't very well move to strike the court's reading of these certainly, so at this time I will just sit down." (Rep. Tr. p. 159, line 17 - p. 162, line 7).

It can clearly be seen from said testimony that counsel for defendant Reinhardtsen and appellants strenuously questioned the right of the trier of fact to examine such documents without there being a Jencks Act motion made. As can be further seen from such testimony the trial judge himself apparently requested the statements and commenced reading same before either counsel

for defendant Reinhardtson or for appellants was aware of the actions of the Court. As previously indicated the statements themselves were highly prejudicial to appellants. For example, the reference therein to appellants' respective prior criminal records is certainly a damaging reference, particularly since such information could not have been put into evidence, or used for impeachment, by the prosecution in the instant case, as appellants exercised their constitutional privilege to not testify at the trial.

See Enriquez v. United States,

188 F. 2d 313 (9th Cir. , 1951).

Appellants submit that the trial judge's actions in this matter, while sitting as the trier of fact, show a clear invasion of appellants' constitutional rights and caused them to be denied a fair trial.

III

THE TRIAL COURT IMPROPERLY DENIED APPELLANT KAPLAN'S MOTION TO SUPPRESS THE SIX \$100 COUNTERFEIT FEDERAL RESERVE NOTES AND ENVELOPE WHICH WERE ADMITTED INTO EVIDENCE AND WHICH SERVED AS THE BASIS OF SAID APPELLANT'S CONVICTION UNDER COUNT FIVE OF THE INDICTMENT.

As heretofore indicated a Motion to Suppress the counterfeit bills and envelope, which constituted the government's exhibits 11 through 17 which were received in evidence, was made on behalf of defendant Reinhardtsen and was joined in on behalf of appellant Kaplan. Both the affidavits filed in support of said motion and the testimony of the government's witnesses at trial showed that no warrant had ever been issued for the arrest of either of appellants or of defendant Reinhardtsen and that no warrant had ever been obtained to search the automobile in which the exhibits in question were discovered. Both the Points and Authorities and Affidavits filed in support of the Motion to Suppress clearly presented facts establishing that there was no probable cause for the arrest of defendant Reinhardtsen, nor was there any consent for the search and seizure made by the government. Evidence and authorities were also offered to the effect that the search and seizure of the automobile was not made incident to a lawful arrest, since the search in question was not contemporaneous in time to the arrest of defendant Reinhardtsen.

The government did not take issue with such evidence and

authorities, but rather took the position that the automobile in question had been properly seized under Title 49, United States Code, §781, et seq., and that under such circumstances there was a right to search said automobile at any time thereafter without the need for obtaining a warrant. In support of this position, the government at time of trial offered the testimony of Agent Tomsic who allegedly informed defendant Reinhardtson that the Chevrolet automobile "was going to be seized as the car had been used to carry a \$100 counterfeit note" (Rep. Tr. p. 174, lines 1-15).

The legal issue underlying the search and seizure in the instant case is, of course, not a new issue to this court. In Burge v. United States, 333 F.2d 210 (9th Cir. 1964), this court concluded that under certain circumstances it would be permissible to search an automobile, which was seized as a carrier of contraband, etc., at some time after the seizure thereof and without the obtaining of a warrant to conduct such search. It was carefully illustrated in the Burge opinion that the basis for decision of the court therein was that under the facts presented that search without a warrant ". . . could not be said to be 'unreasonable' " (333 F.2d 210, 219). The Burge decision listed two criteria which were to be used in determining whether a search without a warrant was "unreasonable". These guide lines were to the effect that (1) if there were an actual seizure the officer or officers making same must have had probable cause for believing that an automobile had been used in violation of Title 49, United States Code, §781, and that (2) the vehicle in question must from the time of seizure until the time of search be

in the lawful custody of the United States government (See 333 F.2d 210, 218).

Examining the instant case in light of such guide lines, and conceding for the moment that the decision in Burge, supra, is applicable to the instant matter, appellants submit that the search in question was invalid. In the first instance Agent Tomsic's aforementioned testimony does not clearly establish that the automobile in question was in fact seized under the section in question and that a proper action was formerly brought to confiscate the automobile. Even if seized, however, appellants submit that Agent Tomsic had no probable cause, within the meaning of the law, for believing that the automobile was subject to seizure.

The facts in the instant case are substantially different than those which were before the court in the Burge case. In that case, which involved narcotics violations, officers had the defendant under surveillance for at least several days; they watched him drive his automobile; they saw him get in and out of it; and on one transaction the defendant was actually seen transferring narcotics to a government informer. The search in Burge, supra, was actually a search conducted to discover the whereabouts of certain marked money which the informer had paid defendant for the narcotics in question, and federal officers had been informed by another informer as to the location of said money. In the instant case it will be recalled that Agent Tomsic did have a description of the automobile in question, knew that a counterfeit note had been passed, apparently by someone who had ridden in the automobile, and that

defendant Reinhardtsen was associated with Mr. Berumen. On the other hand at the time of the alleged seizure there had been no verification that the note in question was counterfeit; no counterfeit bills had been found on defendant Reinhardtsen, although he had been searched by Agent Tomsic. Agent Tomsic was apparently not looking for, nor attempting to arrest, appellant Kaplan, although Mr. Kaplan had apparently driven defendant Reinhardtsen to the lot on the 17th when the allegedly counterfeit bill had been passed (see Rep. Tr. p. 172, line 1 to p. 173, line 19), and even though Mr. Verge, the Kirk Company employee who had originally received the allegedly counterfeit \$100 note on December 17th, did not know whether defendant Reinhardtsen or appellant Kaplan had passed the note or who was driving the automobile on the 17th (see Rep. Tr. p. 51, line 19 to p. 52, line 3).

Certainly the facts in the instant case are substantially different from the quantum of evidence the government had in the Burge case. Other courts when confronted with this issue have also apparently required a more substantial quantum of evidence to establish probable cause for seizure. For example, in Drummond v. United States, 350 F.2d 983 (8th Cir., 1965), the 8th Circuit sustained the trial court's holding that probable cause for seizure of the automobile therein had been established predicated upon the following facts:

The Drummond case dealt with counterfeiting and conspiracy to counterfeit as herein; a third party was arrested while attempting to pass a counterfeit note, and upon arrest told officers that the

accused was a source for counterfeit bills and that the accused's car had been used in delivering of said bills. This witness then went on to describe the automobile in question. Subsequently, agents arrested the accused in a restaurant pursuant to a warrant and found counterfeit bills in his pocket and then located his automobile in the restaurant parking lot, subsequently seized it, and immediately took it to the federal building where a search disclosed the counterfeit bills in question.

While the question of probable cause is certainly one which depends upon facts of the particular case, there can be no question but that the facts of the instant case provide substantially less of a basis for seizing the automobile in question than did those in Burge, supra, or Drummond, supra. It is submitted that the facts in the instant matter are not only less than those in the other cases mentioned, but are also legally insufficient to establish probable cause for the seizure in question.

Regardless of whether probable cause was in fact established for the seizure of the instant automobile, the search which was thereafter made, was clearly unreasonable and unconstitutional. In both of the leading cases dealing with this subject -- i. e. Burge, supra, and Drummond, supra -- one of the criteria which must be established to render such a search valid, is that the automobile to be searched must remain in the custody of the government from the time of seizure until time of search.

As was stated in Drummond v. United States, 350 F.2d 983 (8th Cir. 1965),

"If the agent's version be accepted, the car's search following the seizure, when it had remained in continuous proper government custody, was not an unreasonable one within the prohibition of the Fourth Amendment. [citation]."

The court in Drummond, supra, went on to state that,

" . . . because of the presence of the seizure statute and the agent's action thereto, the case [i. e. Drummond] is factually distinguishable from Preston v. U. S., 376 U. S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964). " ^{1/}

In the present case the facts clearly show that the automobile in question was not in the "continuous and proper government custody" from the time of its alleged seizure until the time in which the search was made which disclosed the evidence in issue. As heretofore mentioned, after Agent Tomsic allegedly seized the automobile and made a cursory search thereof, he moved the automobile at the request of Kirk Company personnel to a spot away from the office of said company to a place somewhere near the end of the Kirk lot (see Rep. Tr. p. 174, lines 1-15). It was not until sometime after Agent Tomsic returned to his office in

^{1/} The Preston case was cited in the memorandum of points and authorities in support of the Motion to Suppress herein and stands for the proposition that even where there is a valid arrest a search of a vehicle must be reasonably contemporaneous in time with said arrest or said search will be invalid if a search warrant is not obtained therefor.

the Federal Building in Los Angeles that he allegedly gave the keys to the automobile in issue to other agents of the Secret Service and instructed them to pick up the automobile, return it to the Federal Garage, and then search it. There is no evidence in the record as to when the automobile was picked up, if it was searched, if it was taken anywhere else other than the Federal Building, or whether these agents or someone else brought the car to the Federal Building. The only other evidence offered by the government in this connection is that at some time on December 20, 1964, the day following the alleged seizure, Agent Tomsic personally searched the automobile at the Federal Garage and discovered the counterfeit bills and envelope in question. Under such circumstances it is clear that the automobile in question was not at all times in possession of the government and that access thereto could have been obtained by others. It is submitted, accordingly, that the search on December 20th was therefore improper and unreasonable.

Although this court has ruled in the Burge case that seizures of the instant nature permit searches thereafter made without warrant, appellants submit that the decision of the United States Supreme Court in Preston v. United States, supra, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), also governs situations where seizures are made under Title 49, United States Code, §781, et seq. It is appellants' contention that even where such a seizure is made, if the search which is thereafter conducted is not reasonably contemporaneous in time (i. e. such as the day after seizure as in the instant case), then a search warrant is

required to conduct such a search of an automobile. If such a warrant is not obtained, as in the instant case, then any evidence obtained as a result of said search is illegal and not admissible.

See also:

People v. Cooper, 234 Cal. App. 2d 587 (1965).

IV

APPELLANT KAPLAN, AS A MATTER OF
LAW, WAS NOT GUILTY OF AIDING AND
ABETTING AS CHARGED IN COUNT 3 OF
THE INDICTMENT AND AS ADJUDGED BY
THE COURT.

Count 3 of the indictment charged defendant Reinhardtson as being a principal in wrongfully passing, on December 17, 1964, a counterfeit \$100 Federal Reserve Note. The indictment then reads that "[a]t said time and place defendant Bernard Kaplan aided, abetted, counseled, induced and procured a commission of the offense alleged above." The trial judge subsequently issued his judgment finding appellant Kaplan guilty of said aiding and abetting offense, although the Court first acquitted defendant Reinhardtson from having any criminal responsibility in connection with the passing of the counterfeit note in question. Under such circumstances, appellants contend that the judgment of the trial court is legally impossible.

While it is true that one who is guilty of aiding or abetting may be punished as a principal (Title 18, United States Code, §2), there can be no question but that the offense of aiding and abetting requires that there be a principal to a crime before there can be an aider and abetter thereto.

Morgan v. United States, 159 F.2d 85

(10th Cir., 1947);

United States v. Honeycut, 311 F.2d 660

(4th Cir., 1962);

United States v. Johnson, 215 F. Supp. 300

(D. C. Md. , 1963);

Perkins v. United States, 315 F. 2d 120

(9th Cir. , 1963), certiorari denied,

375 U.S. 916, 84 S. Ct. 201, 11 L. Ed. 2d

155 (1964).

As was stated in Edwards v. United States, 286 F. 2d 681

(5th Cir. , 1960):

"As the court record under this indictment charges Edwards with aiding and abetting Evans to commit the offense, it was necessary to establish the guilt of Evans as well as that of defendant Edwards.

"The basic principle of law is recognized that an aider and abettor may not be guilty of aiding and abetting a principal unless a principal did as a matter of fact commit a crime. [Citation].

"The law requires a guilty principal before the aider and abettor can be punished. [Citation]. "

See also Karrell v. United States, 181 F. 2d 981

(9th Cir. , 1950), certiorari denied,

340 U.S. 891, 71 S. Ct. 206, 95 L. Ed.

646 (1950);

Morei v. United States, 127 F. 2d 827

(6th Cir. , 1942).

Applying these rules to the instant case it is immediately

apparent that appellant Kaplan could not have been convicted of aiding and abetting the crime charged since the alleged principal therefor was acquitted. This does not mean that appellant Kaplan could not have been "charged" as being a principal in connection with Count 3 of the indictment; however, he was not so charged. Unquestionably one who aids and abets may at the option of the pleader be indicted and prosecuted as a principal - apparently under the common law rule of lesser included offenses.

See Grant v. United States, 291 F.2d 746 (9th Cir., 1961), certiorari denied, 368 U.S. 999, 82 S.Ct. 627, 7 L.Ed.2d 587 (1962);
United States v. Provenzano, 334 F.2d 678 (3rd Cir., 1964), certiorari denied, 379 U.S. 947, 85 S.Ct. 440, 13 L.Ed.2d 544 (1965);
See also Morei v. United States, supra, 127 F.2d 827.

This does not mean to say that one who is charged as an aider and abettor and not charged as a principal can be convicted as a principal. As heretofore indicated, the statutory provisions charging appellant Kaplan with the aiding and abetting offense only provide for punishment of an aider and abettor as a principal. There is no definitional equating of the offense of aiding and abetting to that of being a principal. Accordingly, appellant Kaplan's conviction on count 3 must be reversed.

THE DISTRICT COURT'S REFUSAL TO HAVE THE GOVERNMENT PRODUCE STATEMENTS MADE BY APPELLANTS AND CO-DEFENDANT REINHARDTSEN, PURSUANT TO THE MOTION OF APPELLANTS FOR THE PRODUCTION OF SUCH STATEMENTS, PREVENTED APPELLANTS FROM ADEQUATELY PREPARING THEIR DEFENSE.

As indicated in the Statement of Facts herein Judge Curtis refused, pursuant to appellants' Motion to Inspect and Discover, to require the government to produce statements made by appellants and co-defendant ReinhardtSEN to officers of the government with respect to the subject matter of the instant case. Appellants submit that such statements were of manifest evidentiary importance and were essential to a proper preparation of the defense herein, particularly to enable counsel to give effective and sound advice to his clients.

See: United States v. Francher, 195 F.Supp. 448,
456 n. 17 (D. C. Conn. 1961).

Said statements also, obviously, might have given information to counsel which would have enabled him to decide whether a motion for severance should have been made on behalf of one or both of appellants.

See: Rule 14, Federal Rules of Criminal Procedure;
Belvin v. United States, 273 F.2d 583
(5th Cir. 1960).

Unquestionably, where the interests of justice and equity

dictate, production of this type of material should be compelled by the court.

See: Shore v. United States, 174 F.2d 838
(8th Cir. 1949).

While Rule 16 of the Federal Rules of Criminal Procedure, under which this motion for discovery was made, may not specifically mention the type of material requested by appellants, appellants submit that the rule should and does include the type of material requested by appellants.

VI

APPELLANT KAPLAN WAS DENIED DUE PROCESS OF LAW

Appellants further submit that appellant Kaplan was denied his Constitutional right of due process by reason of the fact that Agent Tomsic failed to inform appellant Kaplan of his Constitutional right to remain silent and that any statement he made could be used against him on the occasion on December 20, 1964, at the Federal garage in Los Angeles, following the search and discovery by Agent Tomsic of the six (6) \$100 Federal Reserve Notes in an envelope in the trunk of said automobile. It will be recalled that at this time Agent Tomsic testified that appellant Kaplan acted as though he knew that the money was hidden in the car trunk and made various other admissions which were damaging to his rights.

The testimony offered the trial by Agent Tomsic was to the

effect that he did notify appellant Kaplan that his statements could be used against him on the 19th of December at a meeting during the evening thereof (See Rep. Tr. p. 247, line 5 to p. 248, line 17). On the following day, however, when the Federal Agents possessed information which they believed to be of a serious nature concerning appellant Kaplan's involvement in the case, they had him come down to the Federal garage purportedly to pick up certain personal property, but actually to apparently see if he would do anything about the counterfeit bills which they had previously discovered in the automobile trunk (Rep. Tr. p. 251, line 24 to p. 252, line 20). It is clear that on this occasion at the Federal garage the federal agents did not caution Mr. Kaplan of his constitutional rights to remain silent, to have an attorney, and/or that any of his statements could be used against him (Rep. Tr. p. 251, line 18 to p. 253, line 7). It would appear that under said circumstances, appellant was improperly cautioned by the Federal agents and that all of such testimony should have been inadmissible against him as he had been denied due process within the meaning of the Fifth Amendment to the United States Constitution.

See: Escobedo v. State of Illinois, 378 U.S. 478,

84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964).

CONCLUSION

Wherefore appellants respectfully submit that their convictions be reversed and that the instant matter be remanded to the District Court.

Respectfully submitted,

ALEXANDER, INMAN & FINE

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Attorneys for Appellants.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the within brief fully complies therewith.

/s/ Maurice C. Inman, Jr.
MAURICE C. INMAN, JR.

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FEB 14 1967

FILED

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IN THE UNITED STATES COURT OF APPEALS
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BERUMEN,

Appellants,

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UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from convictions of uttering and possessing counterfeit obligations of the United States, in violation of Section 472, Title 18, United States Code. The appellants were convicted by the Court, after waiving their right to jury trial, on March 31, 1965, in the United States District Court for the Central Division of the Southern District of California, the Honorable William J. Lindberg, United States District Judge, presiding. Jurisdiction of the District Court was based upon Section 3231, Title 18, United States Code. Jurisdiction of this Court to entertain the appeal is derived from Sections 1291 and 1294, Title 28, United

II

SPECIFICATION OF ERRORS

The following issues are raised in the argument presented in Appellants' Opening Brief:

1. Were the two appellants denied the effective assistance of counsel by their choice to proceed to trial with the same attorney in the face of a possible conflict of interests?
2. Did the examination by the court of statements producible under the Jencks Act, Section 3500, Title 18, United States Code, which statements were presented to defense counsel and the Court prior to a request by defense counsel for their production, unduly prejudice appellant's constitutional rights?
3. Did the Court err in denying appellant Kaplan's motion to suppress as evidence six counterfeit \$100 federal reserve notes which were removed from the trunk of appellant's auto after it was seized by federal agents?
4. Could appellant Kaplan be found guilty under Count Three of the Indictment, which charged him as an aider and abettor, in the same trial in which the person indicted as the principal in Count Three was acquitted?
5. Did the Court err in denying the motion of appellants for production prior to trial of statements made by the appellants to federal agents?
6. Was appellant Kaplan denied due process of law by

the use in evidence of admissions made to federal agents before he was taken into custody and one day after he had been warned of his constitutional rights to remain silent, to have an attorney present, and that any of his statements could be used against him?

III

STATEMENT OF THE FACTS

On January 13, 1965, an indictment returned by the September, 1964 Grand Jury was filed in the United States District Court for the Southern District of California, Central Division, charging violations of Sections 2, 371 and 472 of Title 18, United States Code, by appellants Bernard Kaplan and Alberto Berumen. Specifically, Count One of the indictment charged these appellants, and one Ronald N. Reinhardtson, conspired "to pass, utter, publish and to attempt to pass, utter and publish falsely made, forged, and counterfeited obligations of the United States". Count Two charged appellant Berumen with passing a counterfeit \$100 federal reserve note on or about December 6, 1964. Count Three charged defendant Reinhardtson with passing a counterfeit \$100 federal reserve note on or about December 17, 1964, and that appellant Kaplan "aided, abetted, counseled, induced and procured the commission" of this offense. Count Four alleged that on or about December 19, 1964, appellant Berumen again passed a counterfeit \$100 federal reserve note. Count Five charged that appellant Kaplan and defendant Reinhardtson kept concealed in their

possession six counterfeit \$100 federal reserve notes.

On January 25, 1965, appellants were arraigned before the Honorable Charles H. Carr, District Judge. At this time, Howard E. Beckler entered an appearance as retained counsel on behalf of both appellant Kaplan and appellant Berumen. Pleas were not taken until February 8, 1965, when appellant Kaplan entered a plea of Not Guilty to Counts One, Three and Five, and appellant Berumen pled Not Guilty to Counts One, Two and Four. The matter was then set for trial on March 29, 1965.

Pre-trial motions to suppress evidence, filed on behalf of defendant Reinhardtsen and later joined by appellant Kaplan [R. T. 15], and for discovery and inspection, filed on behalf of the appellants, came before the Honorable Jesse W. Curtis, District Judge, on March 15, 1965. Judge Curtis ordered the Motion to Suppress Evidence continued to time of trial, and, with the concurrence of the government, granted discovery by the appellants of all items requested except those enumerated in paragraphs 5 and 6 of the motion. The items denied were "the statements of each moving defendant herein respecting the subject matter of the instant case, whether the same be characterized as confessions, admissions, or otherwise", and "the statements of Defendant Ronald W. Reinhardtsen" (Motion for Discovery and Inspection, p. 4).

When the case was called for trial on March 29, 1965, government counsel announced ready, informing the Court that "seven out-of-state witnesses, some coming from a distance of

over 2,000 miles", were present [R. T. viii]. At this time, on behalf of appellant Kaplan, attorney Beckler requested a continuance, explaining that in a final interview with his clients two days before, he discovered "a definite conflict of interest between the two defendants" [R. T. viii, ix]. When asked how much time was necessary, appellant Kaplan responded:

"I do need a little time for money. I would say a couple of weeks, for one reason. I had made financial arrangements with Mr. Beckler. Now I have money coming in in about, I would say, somewhere in about two or three weeks. I can't very well walk into an attorney's office without money and say, 'Good morning'." [R. T. x].

Government counsel objected strenuously, arguing that six of his witnesses would be greatly inconvenienced, and commenting:

"There has been no indication to me until about five minutes before court started today that there was going to be a continuance asked for or a conflict. Back the end of January, the beginning of February, Mr. Beckler became the attorney for both Mr. Kaplan and Mr. Berumen. It seems strange to the government that the conflict didn't develop until this past Saturday." [R. T. xi].

At this point, the Court indicated its suspicion that the motion for continuance was a dilatory tactic:

"Well, the thing that casts a little shadow on this is it seems to me that I received word in the middle of the week that Mr. Kaplan was going to make a motion for a continuance based upon illness. . . . It seems to me that we have a disposition on the part of this defendant for a continuance on one ground or another." [R. T. xii].

After passing to other matters, the Court announced that a continuance of three days, to the following Thursday, was being granted [R. T. xiii]. This period was shortened to one day, at the request of Mr. Beckler, and on the basis of these assurances:

"MR. BECKLER: Your Honor, I can arrange for Mr. Kaplan to have competent prepared counsel and we can answer ready today. I will have somebody that I recommend highly to him answer ready. I will spend some time this afternoon and we can answer ready today unless the Court would entertain the motion to continue it until April 19th. This is my first available date. I was thinking that the interests of justice might better be served -- in fact, if at all possible if the witnesses of the government might return to their places and then come back and be assured that we would go to trial on April 19th. If not, rather than trail to Thursday because of the inconvenience to the government witnesses, I will have counsel here to represent Mr. Kaplan answer

ready today.

"THE COURT: Are you ready to go to trial then tomorrow morning?

"MR. BECKLER: Ready right now. Well, ready tomorrow morning. I'll call someone today and we will go over it tomorrow." [R. T. xiv, xv].

On the following morning, when Mr. Beckler appeared to represent both appellants, the Court was told that the conflict "was only limited to the possibility and contingency of a jury. . . . In short, there is no conflict" [R. T. 12-13]. The Court then inquired of both appellants, and both offered assurances that they had resolved any conflicts, and were "fully satisfied then to proceed in trial with Mr. Beckler" [R. T. 13, 14].

After the waiver of jury trial was consented to by each defendant, as well as all attorneys [R. T. 4-11], the government opened its case with testimony related to Count Two of the indictment, including a grocery clerk who identified appellant Berumen as the person who paid for a small order of groceries with a counterfeit \$100 federal reserve note [R. T. 26]; the grocery manager who then took possession of the note and delivered it to a Secret Service Agent [R. T. 35, 36]; and the Secret Service Agent who took custody of the note [R. T. 40].

Proceeding to Count Three of the indictment, the government presented two employees of the G. R. Kirk Company, who identified appellant Kaplan and defendant Reinhardtsen as the men who came

to a wholesale Christmas tree lot, operated by the Kirk Co., on December 17, 1964, and paid for a purchase of Christmas trees with a counterfeit \$100 federal reserve note [R. T. 45-46, 96-97]. A third Kirk employee testified that he took the note to a branch of United California Bank and deposited it [R. T. 84], and the bank teller [R. T. 121 ff.] and assistant cashier [R. T. 125 ff.] established the chain of custody until the note was recovered by a Secret Service Agent [R. T. 130-33].

In proving the fourth count of the indictment, the government called four witnesses: a grocery clerk who identified appellant Berumen as the man who, on December 19, 1964, paid for a small order of groceries with a counterfeit \$100 federal reserve note [R. T. 133 ff.]; the assistant manager of the grocery who was asked to verify the bill [R. T. 143 ff.]; the manager of the store who detained appellant Berumen and called the Hollywood Police Department [R. T. 147 ff.]; and the police officer who responded to the call [R. T. 152-53].

When Secret Service Agent Robert L. Tomsic was called as a witness, the government counsel voluntarily presented defense counsel with copies of all statements of the witness producible under the Jencks Act, Section 3500, Title 18, United States Code [R. T. 154]. As acknowledged by defense counsel, this was done to save time [R. T. 155]. When counsel for defendant Reinhardtson requested a recess to review these documents, the Court asked to see a copy in order to determine how long a recess would be necessary for defense counsel to study the statements [R. T. 156].

After a brief recess, Agent Tomsic was recalled to the stand, at which time both defense counsel objected to the fact that copies of the Jencks statements had been presented to the Court [R. T. 159-61]. In response to this inquiry, government counsel explained:

"Your honor, if I may interject one thing:

Not only are the documents handed to the court for the purposes of seeing whether they should be turned over to defense counsel, but they also have to be previewed by the court in order to find out which witness the document is a statement about. In other words, the Jencks Act doesn't cover all things said about all people. At the same time I handed both defense counsel a copy, at the request of the court I handed the court a copy of the documents." [R. T. 161].

The counsel for appellants Kaplan and Berumen then responded:

"I can't very well move to strike the court's reading of these certainly, so at this time, I will just sit down." [R. T. 162].

The statements were subsequently used by both defense counsel for purposes of cross-examining Agent Tomsic [R. T. 254, 260], and defense counsel also used statements in the report to support his arguments to the Court on the motion to suppress [R. T. 218]. At no time were any of these statements or reports offered in evidence.

The government then proceeded to direct examination of Agent Tomsic, at first limiting his testimony to that relevant to the

Motion to Suppress Evidence [R. T. 159]. Agent Tomsic testified that in the course of his duties as a Secret Service Agent, he received a typewritten note, dated December 18, 1964, which related that a counterfeit note had been passed by a Mr. Brumer at the Kirk Company, and that "Mr. Brumer was driving a white '63 or '64 Chevrolet with Ohio license plates, left front fender wrecked" [R. T. 163]. On the following day, Agent Tomsic went to the Hollywood Police Station, and took appellant Berumen into custody [R. T. 165]. He took Mr. Berumen with him to the G. R. Kirk Co. lot [R. T. 170], and on the way they discussed Mr. Berumen's connection with defendant Reinhardtsen, and made an effort to locate Mr. Reinhardtsen [R. T. 169, 198-199]. Upon arriving, Agent Tomsic was told that the man who passed a counterfeit \$100 bill there had just gotten into his car to leave [R. T. 170]. Agent Tomsic testified that he immediately went out, and saw defendant Reinhardtsen sitting in the front seat of a 1963 white Chevrolet, with a dented left fender [R. T. 171]. The agent then arrested Mr. Reinhardtsen who, after being advised of his rights, acknowledged that he and appellant Kaplan had given the \$100 note to the Kirk Co., and stated that the car belonged to Mr. Kaplan, who had been driving the day the \$100 note was passed at Kirk Co. [R. T. 173]. Agent Tomsic then told Mr. Reinhardtsen the car "was going to be seized as the car had been used to carry a \$100 counterfeit note" [R. T. 174]. The car was secured and left at the Kirk Co. lot with permission of its employees. The same day, it was retrieved by two other Secret Service Agents and brought to the garage of the

Federal Building [R. T. 174-75]. The following day, December 20, 1964, Agent Tomsic went to the garage and, in a search of the trunk, discovered six counterfeit \$100 federal reserve notes in an envelope contained in a box [R. T. 179]. After full argument [R. T. 204-223], the court denied the defense motion to suppress these notes as evidence [R. T. 224].

Agent Tomsic then testified relevant to the case in chief, repeating his testimony as to the discovery of the six counterfeit notes in the trunk of appellant Kaplan's automobile. He further testified that after seizing the car, he had proceeded to the Christmas tree lot operated by the appellants, where he spoke to appellant Kaplan [R. T. 238]. At this time, appellant Kaplan was advised "that he didn't have to make any statements, that any statements he made could be used against him in court, and he was entitled to have an attorney" [R. T. 239]. Appellant Kaplan admitted accompanying defendant Reinhardtsen to the Kirk Co. lot on December 17, 1964 [R. T. 239]. Appellant Kaplan was not arrested at this time, but on the following day he came to the Federal Building to get a trailer hitch off of the seized automobile. As Agent Tomsic testified, at this time Mr. Kaplan admitted that all of the boxes and papers in the car were his, and while Agent Tomsic pretended not to be looking, appellant Kaplan felt through the box in which the counterfeit notes had been found [R. T. 241-42].

The government then presented two witnesses from Chicago, Illinois, who identified appellant Kaplan as the man who, in November of 1964, paid a bill in a Chicago restaurant with a counterfeit

\$100 federal reserve note [R. T. 218 ff., 287 ff.]. The restaurant owner testified further that appellant Kaplan subsequently telephoned him twice: once to arrange reimbursement [R. T. 298]; and once to ask that he not identify the appellant if shown his picture by Federal Agents [R. T. 300].

After all of the federal reserve notes involved in the case were identified as counterfeit by a Secret Service Agent conceded by the defense to be an expert [R. T. 315], they were offered into evidence and the government rested its case [R. T. 318-19].

Appellants Berumen and Kaplan then rested without presenting any defense [R. T. 322]. On behalf of defendant Reinhardtson, only one witness was presented, an associate of his defense attorney, who testified as to the accuracy of an address given by Mr. Reinhardtson to the Kirk Co. [R. T. 325-26], and that Reinhardtson regularly used three different names in the course of his business [R. T. 324].

At the time of closing arguments, the government conceded that evidence was insufficient to convict the defendants of conspiracy under Count One, as well as to show possession by defendant Reinhardtson under Count Five [R. T. 331]. After full argument of counsel, the Court summarized its findings as follows:

"I find Mr. Kaplan guilty as to 3 and 5. I find Mr. Berumen guilty as to Counts 2 and 4. With strong suspicions of guilt, I find the defendant Reinhardtson not guilty as to Counts 3 and 5, and all the defendants not guilty as to Count 1." [R. T. 372].

On April 13, 1965, the Court sentenced appellant Kaplan to a term of three years each on Counts Three and Five, to run concurrently under 18 U. S. C. Section 4208(a)(2), and appellant Berumen to a term of three years each on Counts Two and Four, also to run concurrently.

IV

ARGUMENT

- A. APPELLANTS WERE NOT DEPRIVED OF THE "ASSISTANCE OF COUNSEL" BY THEIR RETENTION OF THE SAME ATTORNEY, DESPITE A CONFLICT IN THEIR RESPECTIVE INTERESTS.
-

In urging that they were deprived of the assistance of counsel, although they do not clearly state so, the appellants are not citing any error on the part of the Court below. Nor could they do so: the Court made every effort to protect the rights of the appellants. When Mr. Beckler, representing both appellants, stated on the day set for trial that he had discovered a conflict of interest between the two defendants, the Court offered to continue the matter for three days, to allow separate counsel to be arranged for Mr. Kaplan, despite the inconvenience to seven government witnesses from out-of-state [R. T. x, xiii]. Mr. Beckler represented that competent prepared counsel could be arranged that very day [R. T. xiv], so the matter was continued one day. On the following day, when Mr. Beckler appeared to represent both appellants, and announced that,

because a jury trial had been waived, the conflict no longer existed [R. T. 13], the Court went to great lengths to ensure that both appellants were willing to proceed with Mr. Beckler as their attorney:

"THE COURT: Very well, I will inquire of Mr. Kaplan, are you aware of that position?

"MR. KAPLAN: Yes, your Honor.

"THE COURT: That might have been of some moment in the event of a jury trial, and you have discussed that fully?

"MR. KAPLAN: Yes, we have resolved anything that might have come up.

"THE COURT: Do you feel you have been fully advised as to all matters and you are fully satisfied then to proceed in trial with Mr. Beckler?

"MR. KAPLAN: Yes, I sure have.

"THE COURT: Mr. Berumen, I would like to ask the same thing of you. You understood this?

"MR. BERUMEN: Yes, we talked it out and it is all straightened out.

"THE COURT: You think now that without a jury trial there would be no occasion for any conflict or any conflict of any moment?

"MR. BERUMEN: That is right.

"THE COURT: And you are quite willing at this time to proceed in trial, represented by Mr.

Beckler, having in mind that he also represents Mr.

Kaplan?

"MR. BERUMEN: Yes, sir." [R. T. 13-14].

It is readily apparent that the Court did everything in its power to ensure that appellants were represented by counsel of their choice. Nevertheless, appellants now urge that the conflict was not reconciled, arguing that Attorney Beckler's representation to the Court "may well have been more influenced by his inability to procure other counsel and commitment to other clients, than by sound reasoning and judgment" [Opening Brief of Appellants, p. 25].

It is the position of the appellee that, even if a conflict did in fact exist, the appellants waived their right to be represented by separate counsel; moreover, neither appellant suffered any prejudice in the course of their representation by Mr. Beckler. Although for the sake of subsequent argument the existence of a conflict will be conceded, it must be recognized at the outset that there is no showing in the record as to what the conflicting interests were, and what effect the waiver of a jury trial had upon the possibility of conflict. As stated by the appellants, "Attorney Beckler was, of course, the only person in a position to make such determination, since he had the benefit of privileged disclosure by his clients to him" [Opening Brief of Appellants, p. 20]. Appellants inconsistently ask this Court, on the one hand, to engage in conjecture and accept the conclusion of Attorney Beckler that a conflict existed, while at the same time attacking the good faith and sound judgment of this very same attorney in concluding that the conflict

had been resolved.

Even if a conflict did exist, and continued to exist after jury trial had been waived, reversible error would not result from Attorney Beckler's continued representation of both appellants if both were aware of the conflict and consented. There is no legal or ethical prohibition of a lawyer representing conflicting interests, as long as there is full disclosure of the facts to the clients. See Canon 6, American Bar Association, Canons of Professional Ethics. Appellants rely upon the case of Glasser v. United States, 315 U. S. 60 (1942) to give constitutional proportion to their argument. Glasser, however, involved direct participation by the Court, in appointing the same lawyer to represent two defendants with conflicting interests. Here, the appellants retained Mr. Beckler, and both expressed a desire for him to continue representing them after being "fully advised as to all matters" [R. T. 13]. As stated by the Supreme Court in the term following the Glasser decision:

"The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive his Constitutional right to assistance of counsel.

" . . . the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open."

Adams v. United States ex rel McCann,

Appellants intimate that their waiver of the right to separate counsel in open court was not an "intelligent, confident waiver" because they had no legal training, and relief solely upon Attorney Beckler's advice [Opening Brief of Appellants, p. 23]. First, reduced to its logical extremities, this argument would require, whenever a conflict seemed possible, that each of two clients seek another separate attorney to advise them whether to continue retaining the first attorney. Because a conflict may subsequently develop in the conduct of a trial does not render an attorney incompetent to render any further advice to his clients. Secondly, this argument presumes that legal advice is required to make a decision whether to waive legal advice. The Supreme Court dealt with this contention in

Adams v. United States ex rel. McCann, 317 U.S. at 277:

"The question in each case is whether the accused was competent to exercise an intelligent, informed judgment -- and for determination of this question it is of course relevant whether he had the advice of counsel. But it is quite another matter to suggest that the Constitution unqualifiedly deems an accused incompetent unless he does have the advice of counsel. If a layman is to be precluded from defending himself because the Constitution is said to make him helpless without a lawyer's assistance on questions of law which abstractly underlie all federal criminal prosecutions, it ought not to matter

whether the decision he is called upon to make is that of pleading guilty or of waiving a particular mode of trial. Every conviction, including the considerable number based upon pleas of guilty, presupposes at least a tacit disposition of the legal questions involved."

See also Leino v. United States, 338 F.2d 154 (10th Cir. 1964).

Returning to the Glasser decision, upon which chief reliance is placed by appellants, the leading case in this circuit discussing Glasser held there was no denial of effective assistance of counsel where retained counsel represented the same two co-defendants who had filed a charge of misconduct against him with the grievance committee of the local bar. In distinguishing Glasser, this Court noted that:

"In considering the claim of prejudice resulting the Court indulged no a priori assumptions. It surveyed the entire record and found there persuasive evidence that the appointment of Stewart as counsel for the alleged co-conspirator had in fact embarrassed and inhibited Stewart's conduct of Glasser's defense. It pointed to numerous and critical instances in which Stewart found himself unable faithfully to serve two masters. We see no resemblance between the situation found to obtain in that case and that developed here." Swope v. McDonald, 173 F.2d 852, 855 (9th Cir. 1949).

This showing of some form of prejudice is crucial, even where a

conflict is clearly shown to have existed. For example, in United States v. Simone, 205 F.2d 480 (2nd Cir. 1953), the Court affirmed the convictions of numerous co-defendants who, because of possible conflicts of interest, had separate counsel -- yet during the trial one or more attorneys would frequently absent themselves and an attorney for a co-defendant "fill in" during his absence. Although the Second Circuit Court of Appeals took a dim view of this practice, it noted that:

"Nevertheless the assertions of prejudice are so tenuous -- indeed, no prejudice whatever is apparent from the record -- that we do not think that a new trial is required. The arrangement was voluntarily assumed by the parties and their claim of prejudice is plainly 'an afterthought.' As Mr. Justice Frankfurter said in his dissenting opinion in the Glasser case, 341 U.S. at page 91: 'the long period of uninterrupted silence concerning his after-discovered injury negatives its existence.'" 205 F.2d at 483.

The appellants have made no effort to in any way show a prejudicial effect of a conflict in the course of the trial. No conduct of Mr. Beckler is pointed to as having been affected by a conflict of interest.

Thus, the appellants' argument fails in three respects: it asks the court to assume the existence of a conflict based upon a bare representation, while at the same time seeking to discredit the attorney who made that representation; it ignores a waiver

which the Court deliberately put "on the record" in the clearest possible terms; and it fails to exhibit any prejudice to the appellants. As stated by this Court in Relerford v. United States, 309 F.2d 706, 708 (9th Cir. 1962), the right to counsel may not be used to play "a cat and mouse game with the court".

B. THE EXAMINATION BY THE COURT
OF STATEMENTS PRODUCIBLE UNDER
THE "JENCKS ACT" DID NOT PREJU-
DICE THE APPELLANTS' CONSTITU-
TIONAL RIGHTS.

Appellants argue that, since defense counsel was given statements producible under the Jencks Act, Section 3500, Title 18, United States Code, without making a request for the statements, it was prejudicial error for the judge to be given a copy of the report. This argument is predicated upon the fact that the judge was sitting as trier of fact, and was thus exposed to prejudicial material which was not admissible in evidence. This argument ignores the fact that a judge sitting as trier of fact sits in a dual capacity. He is still presiding over the court, and must make rulings on the motions and objections of counsel, and determinations as to the admissibility of evidence. In the instant case, a request was made to the trial judge for a recess to peruse the statements presented to defense counsel [R. T. 154]. In order to intelligently rule upon this request, by determining the amount of time necessary to read the statements, the court asked to see a copy of them [R. T. 156]. It cannot and should not be presumed that the matters

contained in the statements prejudiced the judge in his capacity as trier of fact. Even where incompetent evidence is admitted in a trial where the judge sits as trier of fact, an appellate court must presume that this evidence was disregarded by the trial judge. Clauson v. United States, 60 F.2d 694 (8th Cir. 1932). Such a presumption has long been recognized by this Court. United States v. Fairbanks, 89 F.2d 949, 953 (9th Cir. 1937); National Reserve Ins. Co. v. Scudder, 71 F.2d 884, 888 (9th Cir. 1934).

A somewhat analogous situation was presented in United States v. Graham, 46 F.2d 639 (8th Cir. 1931). There, error was alleged in the receipt by the court of an affidavit which it indicated ought not to be considered as evidence. The 8th Circuit Court of Appeals held: "It is not to be presumed that the court gave weight to the contents of the affidavit." 46 F.2d at 640.

It is ironic that the crux of the appellant's argument is based on the fact that no request was made for the Jencks statements. Presumably, if government counsel had refused to produce the statements, and the judge had to make the in camera inspection required under sub-section (c) of the statute, appellants would not argue that the judge, as trier of fact, had been prejudiced by seeing the statements. No explanation is offered as to why prejudice results only when government counsel is cooperative and produces the statements voluntarily.

Logically extended, the position urged by appellants would disqualify a judge sitting as a trier of fact from hearing evidence to determine its admissibility, until its admissibility has been

determined. Moreover, it would undermine the dynamic role imposed upon the trial judge by the Jencks Act, as outlined by the Supreme Court in Campbell v. United States, 365 U.S. 85, 95 (1961):

"The statute says nothing of burdens of producing evidence. Rather it implies the duty in the trial judge affirmatively to administer the statute in such way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute -- the interest of the government in safeguarding government papers from disclosure, and the interest of the accused in having the government produced "statements" which the statute requires to be produced."

C. THE TRIAL COURT DID NOT ERR
IN DENYING APPELLANT KAPLAN'S
MOTION TO SUPPRESS EVIDENCE.

In Burge v. United States, 342 F.2d 408 (9th Cir.), cert. den. 86 S. Ct. 63 (1965), this Court squarely held that a warrantless search of an automobile which had been seized under Section 782, Title 49, United States Code, was not unreasonable. In the instant case, there is no question but that the appellant Kaplan's automobile had been seized under the same statutory provision [R. T. 174]. A subsequent search of the auto revealed six counterfeit \$100 federal reserve notes in an envelope [R. T. 179]. In arguing that these

notes should have been suppressed as evidence, the appellants seek to distinguish Burge in two respects: (1) There was "less probable cause" to seize the vehicle in this case; and (2) The auto was not in "continuous government custody" from the time of seizure until the time of the search.

Probable cause for the seizure in this case was supplied by the following, according to the undisputed testimony of Agent Tomsic of the Secret Service:

- (a) In the course of his duties, he received a note that a counterfeit \$100 federal reserve note had been passed at the Kirk Co. by a "Mr. Brumer" who was driving a "white '63 or '64 Chevrolet with Ohio license plates, left front fender wrecked" [R. T. 163].
- (b) On the following day, appellant Berumen was arrested by the Hollywood Police Department for passing a counterfeit \$100 federal reserve note [R. T. 164].
- (c) Upon taking appellant Berumen to the Kirk Co., where the earlier counterfeit note had been passed, Agent Tomsic was told that the man who had passed the note was just getting into his car to leave [R. T. 170].
- (d) The agent observed that the car referred to was a 1963 White Chevrolet, with a dented left front fender [R. T. 171].

As stated in Ted's Motors v. United States, 217 F.2d 777, 780 (8th Cir. 1954), probable cause to seize a vehicle pursuant to 49 U.S.C. §782 means "less than prima facie legal proof and no more than 'a reasonable ground for belief in guilt' ". It is submitted that the above enumerated factors were more than enough to provide Agent Tomsic with a reasonable ground for belief that the automobile in question had been used to transport contraband. Indeed, the situation differs in no significant respect from that presented in Drummond v. United States, 350 F.2d 983 (8th Cir. 1965), upon which appellants rely. The court in that case explicitly spelled out the factual elements of probable cause:

"Mackey's attempt to pass counterfeit bills in Springfield the preceding day, his federal arrest, his statements to the arresting agents that Long was the source of his counterfeit supply, his description of Long's automobile and of its use for delivering counterfeit, Long's arrest in Saint Louis with counterfeit on his person, and the presence of the described Thunderbird on the restaurant's lot provided the agents with probable cause . . . to conclude that this automobile had been used to transport counterfeit bills of the United States," 350 F.2d at 988.

Appellants seek to transform dicta contained in Drummond in order to manufacture a new requirement for searches after an automobile is seized. They argue that the search is invalid unless

the auto is in "continuous and proper government custody" from the time of seizure until the time of search. The existence of such a requirement is belied by the case of Sirimarco v. United States, 315 F.2d 699 (10th Cir.), cert. den. 374 U.S. 807 (1963). There, a warrantless search of an automobile seized pursuant to 18 U.S.C. §472 was upheld even though the auto was seized by state authorities a day prior to the search by federal agents. Even in the Burge case itself, a full week elapsed between the time the auto was seized and the time the search took place. 342 F.2d 408, 412. This Court did not seem concerned with tracing the custody of the car during that period.

Even if "continuous government custody" should be recognized as a requirement, appellee submits that this requirement was met here. The agent took custody of the automobile immediately upon seizing it at the Kirk Co. He asked permission of Kirk Co. employees to leave the car, and after receiving permission, moved and locked it [R. T. 174-175]. To say that custody was not continuous because the auto was not moved to the federal garage until later in the day would be:

"to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." Jones v. United States, 362 U.S. 257, 266 (1960).

D. APPELLANT KAPLAN'S CONVICTION
UNDER COUNT 3 OF THE INDICTMENT
WAS AUTHORIZED BY SECTION 2, TITLE
18, UNITED STATES CODE.

Section 2(a) of Title 18, United States Code, provides:

"Whoever commits an offense against the
United States or aids, abets, counsels, commands,
induces or procures its commission, is punishable
as a principal."

The appellant argues that this provision only allows an
aider and abettor to be punished the same as a principal; the
Government must still prove that there was a guilty principal be-
fore it can convict someone as an aider and abettor. Thus, it is
urged that since defendant Reinhardtson, who was indicted as the
principal, was acquitted, it was legally impossible to convict appel-
lant Kaplan as an aider and abettor.

This argument was first presented to this Court in Rooney
v. United States, 203 Fed. 928 (9th Cir. 1913). This was an appeal
from a conviction on two counts charging sale of intoxicating drinks
to Indians. As explained by the Court:

"In the first count of the indictment Vincent
Wontock is charged as principal, and Stewart Rooney
as aiding, inciting, and abetting the said Vincent Won-
tock in the commission of the crime. In the third
count of the indictment both Wontock and Rooney are

charged as principals." 203 Fed. at 930.

In a joint trial, Wontock was acquitted, while Rooney was convicted on both counts. This Court affirmed the conviction of both counts on the basis of then Section 332 of the Federal Penal Code, Act March 4, 1909, c. 321, 35 Stat. 1152, which is now 18 U. S. C. Section 2:

"Section 332 of the Federal Penal Code abolishes the distinction between principals and accessories, and makes them all principals. The indictment in this case charges the plaintiff in error as principal (jointly with Wontock) in both counts 1 and 3 - the former by virtue of section 332 of the Federal Penal Code, and the latter by virtue of the language employed. The jury found the plaintiff in error guilty as charged. His acquittal or conviction was in no wise dependent upon the acquittal or conviction of his codefendant Wontock; and the fact that the latter was acquitted cannot affect his guilt."

203 Fed. 928, 933. Accord, United States v. Klass, 166 F.2d 373 (3rd Cir. 1948).

The appellants concede that Mr. Kaplan could have been charged as a principal (Appellants' Opening Brief, p. 43), and there is ample evidence to sustain his conviction as a principal on Count 3 [R. T. 45-46, 96-97]. The fact that the indictment used

the language of "aid and abet" is thus inconsequential. The cases relied upon by appellants without exception involve situations where the proof adduced at trial, and the theory relied upon throughout the trial, was that the defendant aided and abetted another person. For example, in Perkins v. United States, 315 F.2d 120, 122 (9th Cir. 1963), cert. den. 375 U.S. 916 (1964), this Court noted that "under the Government's theory of the case, and under the evidence, Perkins could not have been the person who consummated the sale by transferring narcotics to Gibson". In such a case, the proof concededly must show that there was guilty principal. In the case at bar, however, the evidence established that appellant Kaplan was a principal, present at the scene of the offense [R. T. 45-46, 96-97]. To reverse such a conviction on the grounds that the indictment used the language of "aid and abet" would be to reinstitute the confusing technicalities which 18 U.S.C. Section 2 was designed to eliminate. As stated in Van Patzoll v. United States, 163 F.2d 216, 218 (10th Cir. 1947):

"This statute does away with the subtle distinction recognized, with respect to felonies at common law, between principals and accessories before and at the fact and makes them all principals, whether the offense is a felony or a misdemeanor. Conviction of the principal is not a prerequisite to the conviction of the aider and abettor. And the acquittal of the principal presents no impediment to the trial and conviction of a person charged with aiding and abetting the

commission of the crime. This because one who aids or abets the commission of a crime is guilty as a principal of a substantive, independent offense."

When first enacted, 18 U. S. C. Section 2(a) provided that, "Whoever . . . aids, abets, counsels, commands, induces, or procures its commission, is a principal" (emphasis added). The intent to equate principals and accessories was not disturbed by the Act of October 31, 1951, c. 655, Section 176, 65 Stat. 717, which amended this provision to read "Whoever . . . aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal" (emphasis added). As explained in Senate Report No. 1024, 1951 U.S. Code Cong. & Adm. Service 2578, 2583:

"This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted . . . Section 2(b) of Title 18 is limited by the phrase, 'which if directly performed by him would be an offense against the United States,' to persons capable of committing the specific offense. Section 2(a) of such title, while not containing that language, is open to the inference that it also is limited in application to persons who could commit the substantive offense. If

regarded as a definitive section, the section makes the aider and abettor a 'principal. ' "

Appellants recognize that "unquestionably one who aids and abets may at the option of the pleader be indicted and prosecuted as a principal" [Appellants' Opening Brief, p. 43]. By virtue of 18 U.S.C. Section 2, the opposite is also true: A principal may be indicted and prosecuted as an aider and abettor. Thus, appellant Kaplan's conviction on Count 3 of the indictment was unaffected by acquittal of his codefendant.

E. THE TRIAL COURT'S DENIAL OF THE MOTION OF APPELLANTS FOR PRE-TRIAL DISCOVERY OF STATEMENTS MADE BY APPELLANTS TO FEDERAL AGENTS WAS NOT AN ABUSE OF DISCRETION.

The motion for inspection of the defendants' statements was made pursuant to Rule 16, Federal Rules of Criminal Procedure, prior to the amendment of this rule effective July 1, 1966. As the rule then existed, it was generally recognized that the statement of a defendant was not discoverable, since "Rule 16 applies only to books, papers, documents or tangible objects in which a defendant has had some prior proprietary or possessory interest". United States v. Murray, 297 F.2d 812 (2nd Cir.), cert. den. 369 U.S. 828 (1962). Accord: Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955); Shores v. United States, 174 F.2d 838 (8th Cir.

1949).

Even under the rule as amended, appellants would have had no right to production of statements, since the statements were not "written or recorded". No admissions or confessions were offered in evidence in this case except through the oral testimony of the officers to whom the statements were made [R. T. 166-170, 239-244].

Finally, "even if a confession had been within the rule, it still would have to be remembered that any right under the rule was not an absolute one but one resting in the Court's discretion". Shores v. United States, 174 F.2d 838, 844 (8th Cir. 1949). See also Holt v. United States, 272 F.2d 272 (9th Cir. 1959); United States v. Heath, 260 F.2d 623 (9th Cir. 1958).

F. APPELLANT KAPLAN WAS NOT DEN-
IED DUE PROCESS OF LAW BY USE
OF HIS ADMISSIONS IN EVIDENCE.

Appellants concede that appellant Kaplan was properly advised of his constitutional rights before he was interviewed by Agent Tomsic on December 19, 1964 [R. T. 239]. Although the warning did not follow the form required by Miranda v. Arizona, 384 U.S. 436 (1966), that ruling has no application to cases tried prior to June 13, 1966. Johnson v. New Jersey, 384 U.S. 719 (1966).

A repetition of this warning on December 20th, 1964, was not required under either the Miranda decision or the ruling of

Escobedo v. Illinois, 378 U.S. 473 (1964). As stated in Miranda, 384 U.S. 436, 477:

"The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way. "

Similarly, the Escobedo ruling involved a situation where:

"The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody. "

Kohatsu v. United States, 351 F.2d 898, 901 (9th Cir. 1965), cert. den. 384 U.S. 1011 (1966).

Accord: Irwin v. United States, 338 F.2d 770, 777 (9th Cir. 1964).

Appellant Kaplan was not in custody at the time these admissions were made; in fact, he was allowed to return home that night [R. T. 253]. The statement of appellants that the Federal Agents "had him come down to the federal garage purportedly to pick up certain personal property, but actually to apparently see if he would do anything about the counterfeit bills" (Opening Brief of Appellants, p. 46) is totally without support in the record. It was established through undisputed testimony that appellant Kaplan himself requested and arranged this meeting with the Federal Agents [R. T. 240-241].

CONCLUSION

There appearing from a review of the record no error prejudicial to the rights of appellants, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gerald F. Uelmen
GERALD F. UELMEN

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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BERUMEN,

Appellants,

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APPELLANTS' REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLANTS' REPLY BRIEF

I

BRIEF INTRODUCTORY STATEMENT

Since the filing of Appellants' Opening Brief herein, a Reply Brief has been filed by Appellee, United States of America, and additionally Appellants' Motion to Augment Record on Appeal was granted, and the documents requested therein have been furnished to this Honorable Court as a part of the record on appeal. In the instant Reply Brief, Appellants will address themselves only to those portions of the arguments raised by Appellee which Appellants believe require further clarification or discussion. Appellants submit that other arguments, if any, raised by Appellee are sufficiently

refuted by Appellants' Opening Brief and that further consideration of same herein would serve no useful purpose. Accordingly, Appellants will rely in this regard, upon the arguments and authorities mentioned in said initial Brief.

II

ARGUMENT

- A. APPELLANTS DID NOT AND COULD NOT WAIVE THEIR CONSTITUTIONAL RIGHT TO RAISE THE ISSUE ON THIS APPEAL AS TO WHETHER THEY WERE PROPERLY REPRESENTED BY COUNSEL AT THEIR TRIAL, DUE TO THE CONFLICT IN INTEREST WHICH EXISTED BETWEEN APPELLANTS.
-

According to Appellee "Appellants were not deprived of the 'assistance of counsel' by their retention of the same attorney, despite a conflict in their respective interests". While the government does not necessarily acquiesce to the fact that such a conflict did exist, it does concede that the only person legally qualified in this action to whom the facts pertaining to such conflict were disclosed was the attorney for Appellants, Mr. Beckler. In this respect the record of Mr. Beckler's actions must, of course, speak for themselves. It is clear, however, from Mr. Beckler's statements to the court that at least in his mind there was a definite conflict. No facts or arguments are advanced by Appellee to show how the conflict propounded by Mr. Beckler on the date originally scheduled for trial was or could be resolved by the trial by court

herein. (It will be recalled that the conflict disclosed by Mr. Beckler to the court pertained to statements made by defendant Kaplan which were "extremely essential to Mr. Berumen's defense".) (See Rep. Tr. p. xii, lines 1-14).

In any event the government's main contention with regard to the conflict in interest which existed at the trial is that such conflict must now be deemed immaterial because, according to the government, Appellants waived their rights to raise such issue on this appeal. Appellee's position in this respect is that so long as an attorney in a criminal action informs his clients of a potential conflict there is no problem with his continuing to represent such clients, and that the judge, if he has any duty in this regard, need merely make a simple inquiry in open court as to whether the parties are aware of such a conflict.

While the position taken by the government is interesting, Appellants submit that such is not and cannot be the rule of law in dealing with this type of problem. Putting the problem in the instant case in its simplest terms, the real question involved is two fold -- i. e. (1) whether Appellants, after being informed by their attorney that a substantial conflict of interest in fact existed, can be deemed to have intelligently waived their right to now raise such conflict because this same attorney thereafter informed Appellants that this conflict would not cause a problem in a trial by court, even though the conflict involved statements made by one of the Appellants which were important to the defense of the other; and (2) what duty, if any, the trial judge owed to Appellants to

ascertain whether they in fact knew what they were doing when they relied upon Mr. Beckler's advice that he could continue to represent both of them at the trial in this matter, despite the conflict disclosed.

In connection with the problems raised in this case, it should be noted that the factual situation depicted would appear unique. Accordingly, none of the authorities cited by either Appellants or Appellee are factually directly in point. ^{1/}

^{1/} For example, the cases upon which chief reliance is placed by the government in this area are Adams v. United States ex rel McCann, 317 U.S. 269, a case wherein the defendant represented himself in pro per at trial, but "had studied law, and was sufficiently familiar therewith to adequately defend himself, and was more familiar with the complicated facts of the case than any attorney could ever be" (at p. 270). The defendant in the Adams case had, in fact, previously brought and prosecuted appeals in civil actions all the way to the United States Supreme Court. Under such facts the Supreme Court concluded that the waiver of the right to counsel by the defendant was an intelligent, informed judgment on his part. The government also relies upon the case of Swope v. McDonald, 173 F.2d 852 (9th Cir. 1949), wherein the court concluded that the defendants therein suffered no prejudice by having the same lawyer at trial, where under the version of the facts most favorable to defendants on appeal, it was disclosed that on the day of trial one of the defendants told his lawyer that he wanted other counsel to represent him on the ground that his present lawyer had failed to bring a habeas corpus proceeding to have defendants released from jail during the period of time between their arrest and their trial, even though said lawyer had informed defendants that he had been advised by the court that the trial date would be sooner than any date for a hearing on the habeas corpus proceeding. Under such circumstances there was not, of course, any conflict or improper representation. Appellee also purports to rely upon the case of United States v. Simone, 205 F.2d 480 (2nd Cir. 1953), wherein on several occasions during the course of the trial one or more of the attorneys would be briefly absent from the courtroom and during this interim one of the remaining counsel would nominally represent the missing attorney's client. In the case no possible conflict or prejudice was or could conceivably be shown. The Court of Appeals, however, pointed out that the "defendants' failure themselves to object to the substitutions [of counsel] is not a waiver of their constitutional privilege to be represented by counsel of their own choice".

The rule of law, however, in dealing with the problems raised by this case is quite clear and is directly applicable to the factual issues presented. Despite Appellee's assertions, insofar as Appellants' actions are concerned in permitting Mr. Beckler to continue to represent both of them at trial, it is totally inconceivable that they could intelligently make such a decision without consultation of other counsel or of the court in lieu of Mr. Beckler's representations to them that there would be no conflict if he continued to represent them. It must be remembered in this regard that this is not an action wherein two or more parties represented by the same counsel are made aware of the conflict, but decide to continue with the same representation of counsel despite the conflict. Under the facts herein, Appellants relied upon Mr. Beckler's statements to them that the conflict had been resolved by virtue of the trial by court.

Insofar as the duties of the trial judge is concerned, Appellants submit that it was the obligation of the court, under the facts presented herein, to clearly establish that the conflict propounded by Mr. Beckler had been resolved. Admittedly, Judge Lindberg did ask the Appellants if they were satisfied to have Mr. Beckler continue to represent them, and upon Mr. Beckler's advice that there was no further conflict, Appellants, of course, agreed to such continued representation. Unquestionably, however, a greater duty was owed by Judge Lindberg. Appellee suggests that nothing more could have been done by Judge Lindberg to inquire into the potential conflict, since he was to be the trier of fact, and

accordingly, in effect, could not inquire further into the conflict without prejudicing himself (although he conceivably already had been prejudiced by virtue of his knowledge of the possible conflict). It is obvious that under such circumstances, Judge Lindberg had various simple alternatives. For example, he could have refused to consent to the waiver of a jury and inquired further into the potential conflict. He could have remanded the matter to the assigning trial court for further inquiry by that court or some other judge as to the nature of the conflict. He could have requested further information on the conflict himself, and thereafter, if satisfied that such a conflict did in fact exist and that the disclosure thereof to him might be prejudicial in his mind to the conduct of a fair trial, then disqualify himself from sitting as the trier of fact. In fact, however, nothing more was done by Judge Lindberg, and this failure to further inquire was, it is submitted, reversible error. Appellants believe that the holding of the Circuit Court in the case of Campbell v. United States, 352 F.2d 359 (D. C. Cir. 1965), is particularly applicable to the facts of the instant case. In Campbell the District Court reversed the conviction of one of the defendants on the grounds that his defense was substantially prejudiced by sharing counsel with his co-defendant. The record in the case was silent as to whether the defendants were sufficiently aware of the importance of having separate counsel. The court concluded:

"When two or more defendants are represented by a single counsel, the District Court has the duty to

ascertain whether each defendant has an awareness of the potential risk of that course and nevertheless has knowingly chosen it.

"The Supreme Court has stressed the importance of having separate counsel representing co-defendants where their interests may not coincide. [citation]. In our opinion we have suggested that co-defendants are 'entitled to be represented by separate counsel . . . [if] there was some inconsistency in joint representations.' [citation]. We have also noted that defendants are unlikely to be sufficiently aware of their rights to object to a possible conflict of interest. [citation]. And the Supreme Court has stated that the trial judge bears 'the duty of seeing that the trial is conducted with solitude for the essential rights of the accused,' specifically the right to effective assistance of counsel. [citation]. The judge's responsibility is not necessarily discharged by simply accepting the co-defendants' designation of a single attorney to represent them both. An individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks. Consideration of effective judicial administration as

well as the important rights of defendants are served when the trial court makes the affirmative determination that co-defendants have intelligently chosen to be represented by the same attorney We must indulge every reasonable presumption against the waiver of the unimpaired assistance of counsel. [citation]." (at pp. 360-361) (Emphasis added).

Examining the events which transpired in the instant action in terms of the holding in the Campbell case, there can be no question but that it must be presumed that Appellants' defense was prejudiced by their retention of Mr. Beckler, that they did not intelligently waive their right to question the assistance provided them by counsel, and that the trial judge did not properly ascertain whether defendants were exercising intelligent judgment in having joint representation at trial. Accordingly, Appellants' conviction must be reversed.

B. PREJUDICE SUFFERED BY APPELLANTS
BY VIRTUE OF THE IMPROPER EXAM-
INATION BY THE TRIER OF FACT OF
CERTAIN GOVERNMENT REPORTS HERE-
IN, WARRANTS REVERSAL OF APPELLANTS'
CONVICTIONS.

Clearly, a fundamental concept of "due process of law" is that parties to controversies are entitled to have them determined by an impartial tribunal which is free from bias and prejudice.

Lee v. Fleming, 158 F.2d 984, cert. den.

331 U. S. 805;

Baker v. Simmons Company, 342 F.2d 991

(1st Cir. 1965).

In the instant case it is clear that the United States Treasury Secret Service Department report dated February 2, 1966, and the letter from the Treasury Department to Manuel L. Real, dated January 5, 1965, which documents, pursuant to Appellants' motion, are now a part of the record on appeal herein, contain numerous hearsay and other objectionable matters. Appellee does not question the prejudicial nature of the documents or the consideration thereof by the trial court; instead, the sum and substance of the government's argument is to the effect that a trial judge, when sitting as a trier of fact, is capable in his own mind of reviewing any amount of prejudicial and inadmissible evidence, and then completely disregard such evidence in reaching his decision as to guilt or innocence. In support of this position, Appellee cites four time honored civil actions which purportedly present situations "analogous" to the instant case. Unfortunately, the authorities relied upon are totally irrelevant to the issues herein and in fact do not stand for the proposition for which they are cited.

For example, in the case of the United States v. Graham, 46 F.2d 639 (8th Cir. 1931), the question presented was whether the Court should default a security bond against the surety following the failure of a defendant to appear for trial. The trier of fact admitted into evidence an affidavit by the defendant for whom the

bond had been issued, which affidavit contained averments to the effect that the defendant was unaware of the trial date and had made no attempt to escape, together with other exculpatory type material. The Appellate Court held that there was no presumption that the Court gave weight to the affidavit, since "substantially all that was stated in the affidavit appeared by other evidence received without objection" (46 F. 2d at 640). The cases of Clauson v. United States, 60 F. 2d 694 (8th Cir. 1932), and United States v. Fairbanks, 89 F. 2d 949 (9th Cir. 1937), both involved actions by beneficiaries attempting to enforce war risk insurance policies. In Fairbanks certain hypothetical questions were answered by a medical expert, over objection. On appeal, however, no objection was raised by the Appellant with respect to the evidence being improperly received. The appellate court, however, in any event, considered the evidence in question to be immaterial, since the trial court in its opinion specifically stated "opinion evidence such as the higher Court has ruled out has been disregarded in this case" (89 F. 2d at page 953). Similarly, in the Clauson case it would appear that the counsel for the Appellant failed to voice timely objections to the evidence in issue therein, and accordingly, the Appellate Court held that under such circumstances it could not be presumed that the trial court did not disregard any improper evidence. The case of National Reserve Insurance Company v. Scudder, 71 F. 2d 884 (9th Cir. 1934), involved a civil action to reform a policy of fire insurance. In the case there was no showing of any evidence having been improperly admitted.

Even assuming (although there is absolutely no authority for such conclusion) that Appellee might be correct in its statement that in general an appellate court must presume that evidence of an improper nature is disregarded by trier of fact, Appellants submit that in a criminal matter such as the instant case, and particularly where one of the counts of the indictment charges a conspiracy, alleging a scheme to commit crime among the various defendants, an examination by the trier of fact of the documents in issue would clearly seem to be so prejudicial as to create bias, even though an honest attempt is made to disregard such matters. Certainly information as to the prior criminal records of both of Appellants, and lack of such record on the part of defendant Reinhardtson, no doubt influenced the trier of fact in his convicting of Appellants, while acquitting defendant Reinhardtson. Additionally, the conclusions of the investigating officers, which are completely hearsay, and inadmissible as evidence, are prejudicial in context, and when examined by the trier of fact would establish a relationship of guilt between the Appellants, despite the fact that there simply was no actual evidence of any conspiracy. Without doubt, the prejudice suffered by Appellants clearly outweighs any other consideration in this connection.

Insofar as the question of consideration of such statements being an absolute necessity by the trier of fact, Appellants submit that their Opening Brief adequately covers this subject, with the exception that Appellants reiterate the fact that the choice of having the trial court consider such statements is the choice of Appellants

and not the government.

See: Mims v. United States, 332 F.2d 944
(10th Cir. 1964).

III

CONCLUSION

The record in the instant action clearly establishes that numerous errors of law were made during the course of Appellants' trial, and that Appellants were substantially prejudiced thereby. Under such circumstances, it is respectfully submitted that Appellants' respective judgments of conviction must be reversed.

Respectfully submitted,

ALEXANDER, INMAN & FINE

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GARY GOLDMAN

Attorneys for Appellants
BERNARD KAPLAN and
ALBERTO BERUMEN

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

| | | |
|--|---|-------------|
| JOSEPH CARL PARROTT, <div style="text-align: right;"><i>Appellant,</i></div> | } | |
| vs. | | |
| UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Appellee.</i></div> | } | No. 20730 ✓ |
| | | |
| ROBERT ALAN LAWRENCE, <div style="text-align: right;"><i>Appellant,</i></div> | } | |
| vs. | | |
| UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Appellee.</i></div> | } | No. 20746 ✓ |
| | | |
| TERRY ALLAN WOLFE, <div style="text-align: right;"><i>Appellant,</i></div> | } | |
| vs. | | |
| UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Appellee.</i></div> | } | No. 20926 ✓ |
| | | |
| LEONARD RALPH WALKER, II, <div style="text-align: right;"><i>Appellant,</i></div> | } | |
| vs. | | |
| UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Appellee.</i></div> | } | No. 20927 ✓ |

APPELLANTS' OPENING BRIEF

FILED

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JUN 15 1966

WM. B. LUCK, CLERK

FEB 14 1967

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IN THE
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| vs. UNITED STATES OF AMERICA, <i>Appellee.</i> | | |

APPELLANTS' OPENING BRIEF

JURISDICTION

These are appeals from judgments rendered and entered by the United States District Court for the Southern District of California, Central Division.

Each appellant was sentenced to custody of the Attorney General for a period of three years except Walker, who was given two, concurrent, three year sentences, one on each of two counts (R. P. 15, R. L. 4, R. Wo 6, R. Wa 7).¹ Title 18, Section 3231, United States Code, conferred jurisdiction in the district court over the prosecutions of these cases. This court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notices of appeal were filed in the time and manner required by law (R. P. 18, R. L. 6, R. Wo 7, R. Wa 8).

STATEMENT OF THE CASES

The indictments charged each appellant with a violation of the Universal Military Training and Service Act, Walker being charged with two violations. Parrott was charged with failing to perform civilian work (R. P. 3); Lawrence with refusing to submit to induction (R. L. 2); Wolfe, with refusing to submit to induction (R. Wo 2) and Walker, in Count One with failing to report for induction and in Count Two with failing to advise his local board where mail could reach him (R. Wa 2).

Appellants pleaded not guilty, were tried, Parrott and Lawrence by Judge Peirson M. Hall, without a jury, Wolfe and Walker by Judge E. Avery Crary, with juries, found guilty and sentenced, all as shown in the short Clerk's Transcript on file in each appeal.

1. R. refers to the typed Transcript of Record, P. for Parrott, etc.

Written motions for judgments of acquittal were filed in each case.

Additionally, each case presents the problem of admissibility of the government's evidence

THE FACTS

Each appellant professed conscientious objections to war. Only Parrott was so classified. He then refused to do the civilian work required of conscientious objectors, basing his refusal on his commitment to his ministry, he (alone) being one of Jehovah's witnesses.

Where additional facts are applicable to a point in the argument they will be mentioned, and with reference to the records' pagination.

QUESTIONS PRESENTED AND HOW RAISED

I

Did the trial courts err, in admitting appellee's essential evidence (the Selective Service System file, Exhibit One) over objection of each appellant?

II

Was there a basis in fact for rejecting the classification claims of each defendant?

III

Was each local board required to reopen the classification of its registrant and reclassify him after he presented new evidence?

Point I was raised by objection to the admission of the exhibit, Points II and III by motions for judgment of acquittal and the following points (ones not common to all appellants) were included in the written motions.

IV

Was appellant Lawrence illegally denied the statutory I-S classification?

V

Was appellant Wolfe denied procedural due process at his induction ceremony?

SPECIFICATION OF ERRORS

I

The district courts erred in the admission into evidence of the Selective Service System files.

II

The district courts erred in failing to grant the motions for judgment of acquittal

SUMMARY OF ARGUMENT

I

The trial courts erred, in each trial, in admitting the government's exhibit, over objection.

Without this exhibit each prosecution must fail.

Admission of these exhibits offends Rule 44, §1732, and is contrary to the oral evidence.

II

In each instance the appellant made out a prima facie case and no record was made rebutting it. The local board is required to make a rebutting record when confronted with a prima facie case. *Dickinson v. United States*, 346 U.S. 389.

III

Each appellant except Parrott presented evidence of a new status, which if true required reopening and reclassification. In none of these cases did the administrative agency reopen the classification and thus each registrant was deprived of an appellate determination.

MacMurray v. U.S.A., 9 Cir., 1964, 330 F.2d 928;
U.S.A. v. Bender, 3 Cir., 1953, 206 F.2d 247;
U.S.A. v. Vincelli, 2 Cir., 1954, 216 F.2d 681;
U.S.A. v. Henderson, 7 Cir., 1955, 223 F.2d 421;
U.S.A. v. Stepler, 3 Cir., 1958, 258 F.2d 310;
U.S.A. v. Olvera, 5 Cir., 1955, 223 F.2d 880;
U.S.A. v. Stain, 9 Cir., 1956, 235 F.2d 339;
U.S.A. v. Hinkle, N.D. Calif. 1954, No. 11067;
U.S.A. v. Nichols, S.D. Calif. 1953, No. 22951.

IV

Appellant Lawrence was illegally denied the statutory I-S classification.

U. M. T. & S. Act, 1951 §6(i).
 32 C.F.R. §1622.15(b).

V

Appellant Wolfe was denied due process of law at his induction ceremony.

At his induction ceremony he was not given the mandatory warning that refusal to submit to induction was a felony carrying a penalty of five years imprisonment and/or a \$10,000.00 fine, at the time prescribed by the regulations.

ARGUMENT

I

Failure of Proof

The Government's Exhibit should not have been admitted, over objection.

In each prosecution the government relied on the Selective Service System's file of the defendant to prove his guilt.

We believe it will be undisputed that if the court erred in admitting this exhibit the government's case, in each instance, must fall.

In the prosecutions of Lawrence, Parrott and Wolfe the exhibit was admitted solely on the basis of a certificate that accompanied it. This certificate is a thin paper sheet attached to the front of the photocopy of the file.

In the fourth (and last) of the series of prosecutions, that of Walker, the prosecutor of Walker had also been the prosecutor of Lawrence and had heard defense counsel's objections (and perhaps had heard from the other two

prosecutors of their similar encounters in the Parrott and Wolfe cases); in any event in the Walker prosecution the effort to introduce the exhibit was elaborate. It is set forth in the Reporter's Transcript, pages 10-24 and we will make some detailed comments on it, with quotes, below. It is evident this effort was no mere tossing of a photocopy of the file on the clerk's desk, as was the case, we contend, in the first three of these trials. Nevertheless, appellant Walker contends that it, too, was lacking, particularly in foundation. The other appellants contend that if it is determined by this court that the relatively careful presentation in Walker's case is fatally lacking that the no-oral-evidence presentations in their cases certainly must also fall.

The objections made by appellants are based on §1732, Title 28 U.S.C., on Rule 44, Federal Rules of Civil Procedure (Rule 27, F.R. Cr. P.) and that the exhibits in the first three cases were photocopies. In the last prosecution, Walker's, Major Malcom F. Miller had the original file with him.

We point out that the record shows—

1. Major Miller testified that *he* was the custodian of Walker's files [Rep. Tr. 15, line 16] whereas the certificate on the front of Walker's file shows Captain Proffitt to be the custodian.

2. The Major's testimony itself quite clearly shows all the facts essential to a determination of the question, a determination adverse to the appellee's contention:

- a. The file is kept by the local board clerk (Rep. Tr. 12/16).

b. When a prosecution is contemplated the file is sent to various places, including the offices of the (1) United States Attorney and of the (2) State Director for Selective Service and of his (3) regional assistants (Rep. Tr. 12/25).

c. Ordinarily the files are not out of the local board's office (Rep. Tr. 14/21).

d. During the trial period "they are in *hands* of the United States Attorney" [Rep. Tr. 15/11, italics supplied] although the prosecutor had phrased his question to the witness "Major Miller are these files in custody of your office." (Rep. Tr. 14/19).

e. In the regular course of business they are in the local board office (Rep. Tr. 16/1—); the original file is returned to the local board after the state officials look it over (Rep. Tr. 22/10).

The argument of all appellants may be summed up by the following:

1. The question asked of Major Miller:
"Is it fair to say, Major, that you are only a temporary custodian, and even more fair to say a forwarding agent?" (Rep. Tr. 22/21) He was not permitted to answer.
2. In each of the three other cases the original file was never in court. The argument on their sub-point was detailed in Lawrence's case, Rep. Tr. 5/11—, and will not be repeated here.

In conclusion we contend it is a bad practice, and to be condemned. In Walker's instance the office of the United States Attorney seemed to realize the hazard of continuing it but, as pointed out above, brought the wrong witness into court, among other things.

II

The Denial of the Claimed Classification by the Selective Service System Was Without Basis in Fact, Arbitrary, Capricious and Contrary to Law.

A. The appellants Lawrence, Wolfe and Walker professed conscientious objections to military training. They each claimed the I-O classification.

32 C.F.R. §1622.14 provides for the I-O classification:

“1622.14 Class I-O: Conscientious Objector Available[^] for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.

“(b) Section 6(j) of Title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

“Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.’

B. Appellant Parrott claimed the minister's classification of IV-D.

32 C.F.R. §1622.14 governs classification of registrants presenting evidence for a minister's status.

1622.43 Class IV-D: Minister of Religion or Divinity Student.—(a) In Class IV-D shall be placed any registrant:

- (1) Who is a regular minister of religion;
- (2) Who is a duly ordained minister of religion;
- (3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or
- (4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of Title I of the Universal Military Training and Service Act, as amended, contains in part the following provisions:

"Sec. 16. When used in this title—* * * (g) (1) the term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practises of a religious character to preach and to teach the doc-

trines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

“(2) The term ‘regular minister of religion’ means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

“(3) The term ‘regular or duly ordained minister of religion’ does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.”

We will first make a very short, general argument that applies to all four appeals:

The attitude of the Selective Service System and of the courts below, concerning whether there was a basis in fact for the classifications was grounded upon error. To begin with, it ignores the doctrine of *Dickinson v. United*

States, 346 U.S. 389 (1953). That decision requires that the board, “* * * must find and record affirmative evidence that he has misrepresented his case * * *”— 346 U.S., pp. 396, 397, 399 (dissenting opinion).^{*} These agency and courts’ decisions below, with respect to appellants other than Parrott also ignore the doctrine of *Witmer v. United States*, 75 S. Ct. 392 (1955), wherein the yardstick of sincerity is made decisive. Absent any finding recorded that questions it, the Dickinson doctrine controls, as it controls court review of *all* Selective Service System classifications. Also ignored are the teachings of a long line of Court of Appeals decisions that will be cataloged several pages hereinafter.

The Supreme Court, in *Dickinson*, refers to affirmative evidence of sham and to its recordation, as essential to a prosecution.

We will now argue Parrott’s case:

“Vocation” is the chief consideration, here. “Full-time” is nowhere mentioned; nor is “part-time” mentioned. Nor is the word “Pioneer” or any equivalent expression used. Neither hours of activity nor clerical title are recognized by the Act or the regulations as factors in classifying.

Ministerial activity that is “irregular” is stated to be a disqualification. This consideration does not apply here.

^{*}The language of *Dickinson* is:

“But when the uncontroverted evidence supporting a registrant’s claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.

“Reversed.” (74 S. Ct. 152, 157).

Appellant's uncontradicted evidence is that he regularly performed enumerated clerical activity.

The only other disqualifying consideration mentioned by law is "incidental". Here there was no finding by the board on this factor. Appellant's factual and relevant testimony was to the contrary. None was rebutted. The final step of his processing by the Selective Service System shows that he didn't regard his ministerial work as incidental to other work but as something so important to him that he willingly faced a prison term when it became clear that the I-O classification given him would interfere with his obligation to Jehovah.

Thus, it is seen that appellant Parrott made out a prima facie case, and an unrebutted one.

We will now argue the prima facie cases of the other three appellants.

Congress says that a man is a conscientious objector if he (1) believes in a Supreme Being, (2) conscientiously opposes participation in the armed forces by combatant or noncombatant service, and (3) bases such objection on religious training and belief. The appellants concededly believed in a Supreme Being. Each concededly claimed to base those objections on his religious training and belief.

Recent decisions* have greatly broadened the construction of "religious" belief but there probably will be no debate on this, the religious belief phase of the appeals.

**U.S.A. v. Seeger*, 85 S. Ct. 850 (1965); *Fleming v. U.S.A.*, 344 F.2d 912 (10 Cir., 1965).

The evidence submitted by the appellants established at least *prima facie* that they had sincere and deep-seated conscientious objections against participation in combatant and also noncombatant military service and that these objections were based on a "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that their beliefs were not solely based on "political, sociological, or philosophical views, or a merely personal moral code"; that they arose from their religious training and belief.

The Selective Service System raised no question (none is recorded) concerning the veracity of the appellants. The question therefore, is not one of fact, but is one of law; *Dickinson v. United States, supra*. The law and the facts in the files, at least *prima facie*, established that appellants are conscientious objectors opposed to combatant and noncombatant service.

III

When Evidence of a New Status Is Presented to the Local Board It Is Required to Reopen the Classification; If It Acts Arbitrarily the Registrant Is Also Illegally Deprived of Administrative Appellate Opportunities.

"32 C.F.R. §1625.1. Classification Not Permanent.
(a) No classification is permanent."

The appellants affected by this element in the appeals are Wolfe, Lawrence and Walker.

Each gave his Local Board evidence, after the expiration of his initial appellate time (which is 10 days after mailing of a Notice of Classification) of a status that was

new and, as the applicable regulation phrases it, if true, required a "reopening" [for a testing of the truth] and a reclassification to a deferred class [32 C.F.R. Part 1625]. In each instance the appellant's local board did not reopen his classification. Even if each board had given another I-A classification on a reopening and reclassification this would have given the registrant appellate rights on his new status claim. This was the principal deprivation.

Additionally, it is to be noted we do not have here a situation of "delaying tactics" because none of these appellants had ever had an appellate determination, on any claim (Wolfe, see Ex. 11; Lawrence, Ex. 11, and Walker, Ex. 11). The argument sometimes advanced that a registrant can frustrate the selective process by successive appeals (if this can ever be so) can have no place in these cases.

Assuming that it is discretionary for a local board to "reopen" what we do have here, in the best light, is an abuse of discretion. We submit these young men should have had (and by reversal will have) their evidence and claims considered as Congress has provided.

We have here, in all these three cases, the conscientious objector claim; this is a special type of claim; it presents a situation where Congress intended to take such registrants away from local prejudice and to provide a relatively accurate method of determining sincerity: by the FBI inquiry, a Hearing Officer's Hearing and a final evaluation of everything by a Department of Justice expert,

who makes a lengthy analysis and recommendation to the Appeal Board. None of these appellants had any of this special (or any) appellate procedure.

The deprivation of this appellate opportunity has already been condemned in *MacMurray v. U.S.A.*, 9 Cir., 1964, 330 F.2d 928.

Also see:

U.S.A. v. Bender, 3 Cir., 1953, 206 F.2d 247;

U.S.A. v. Vincelli, 2 Cir., 1954, 216 F.2d 681;

U.S.A. v. Henderson, 7 Cir., 1955, 223 F.2d 421;

U.S.A. v. Stepler, 3 Cir., 1958, 258 F.2d 310;

U.S.A. v. Olvera, 5 Cir., 1955, 223 F.2d 880;

U.S.A. v. Stain, 9 Cir., 1956, 235 F.2d 339;

U.S.A. v. Hinkle, N.D. Calif. 1954, No. 11067;

U.S.A. v. Nichols, S.D. Calif. 1953, No. 22951.

Since the Hinkle and Nichols cases are unreported we give the pertinent parts:

In Hinkle, Judge Oliver J. Carter said:

"The problem to me resolves itself down to whether when Mr. Hinkle claimed a change in status, a real change in status, was the draft board guilty of abuse of discretion by refusing to reopen. Now, it is my opinion the draft board was. That does not mean that I would in any way conclude that Mr. Hinkle is in fact a full time minister of the gospel. That I leave to the draft board. And the only thing that I rule is that he should have the opportunity to make his claim and present his evidence and then have a decision based upon the facts.

"In that situation it is my duty to find the defendant not guilty, and I so find him at this time."

In Nichols, Judge Harry C. Westover said:

"We are not now attempting to pass upon the validity of defendant's claim that he is entitled to a ministerial classification. He did, however, make that claim to his local board. The local board by refusing to reopen the case took away from registrant the right to have the matter passed upon by the appeal board. We do not believe it was the intent of Congress to place with the local boards the arbitrary right to determine when a registrant should be entitled to an appeal. The local board might very well disagree with the registrant's contention, but local boards should be vigilant at all times to see that registrants have a right to test their opinions upon appeal. It seems to the court that the action of the local board in this case was arbitrary, as it took away from registrant the right to present to the appeal board his claim that he was a minister.

"This court is of the opinion that Congress intended registrants should have a right to appeal classifications to appeal boards, and that right of appeal should not be taken from them arbitrarily by local boards which refuse to reopen classifications. Because of the arbitrary action of the local board in the case at bar, which deprived defendant of his right of appeal, it is necessary that this court find defendant not guilty as charged."

IV

Appellant Lawrence Was Illegally Denied the Statutory I-S Classification.

U. M. T. & S. Act (1951), as amended, §6(i) (2) says that college students satisfactorily pursuing a full-time course shall be deferred until the end of the school year.

32 C.F.R. §1622.15 (b) says:

(b) In Class I-S shall be placed any registrant who while satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and during his academic year at such institution is ordered to report for induction, except that no registrant shall be placed in Class I-S under the provisions of this paragraph (1) who has previously been placed in Class I-S thereunder, or (2) who, prior to June 19, 1951, had his induction postponed under section 6(i) (2) of the Selective Service Act of 1948, as amended, or was deferred as a student under section 6(h) of such Act. A registrant who is placed in Class I-S under the provisions of this paragraph shall be retained in Class I-S (1) until the end of his academic year, or (2) until he ceases satisfactorily to pursue such course of instruction, whichever is the earlier. The date of the classification in Class I-S and the date of its termination shall be entered in the "Remarks" column of the Classification Record (SSS Form No. 102) and be identified on that record as Class I-S (C).

Page 23 of Selective Service System file of Lawrence (the government's exhibit) is the college's certificate, dated May 18, 1965, that he was to graduate in June, 1966.

Page 24 is his letter confirming this.

Page 11 is the Minutes of Action of Local Board. It shows he was never classified in Class I-S, although the local board gave him what it considered to be the equivalent: "5-20-65 Postponement of Induction (SSS 264) mailed registrant, postponed until June 1965 induction call date".

This was not the equivalent. If he had been given the I-S classification he then would have had the opportunity to timely present his claim for the conscientious objector classification. The order to report for induction is the standard deadline. 32 C.F.R. §1625.2. Only a registrant in Class I-A or I-A-O can be given an order to report for induction. The I-S would have cancelled the order to report for induction and thus given Lawrence his opportunity. The local board could then have given him another I-A classification notice *but* he would then have been able to perfect an administrative appeal. This he never had. The deprivation of this opportunity is the vice present here, and is the denial of procedural due process.

V

Appellant Wolfe Was Denied Due Process of Law at His Induction Ceremony.

At his induction ceremony he was not given the mandatory warning that refusal to submit to induction was a felony carrying a penalty of five years imprisonment and/or a \$10,000.00 fine.

All witnesses agreed on the facts (all references hereinafter being to the page and line of the reporter's transcript in Wolfe's case), Terry Allan Wolfe's testimony 19/13, 44/11—, Captain John H. Walsh's testimony 52/18—.

The particular fact that we contend is crucial is that there was no warning of penalty, as the pertinent regulation mandatorily presents, *between* the two "opportunities

ities" given by the inducting officer. The testimony of the inducting officer leaves no doubt of this: "That is true, he wasn't between the two opportunities." (52/18—).

The case law on induction procedure has developed as follows:

Initially, this court, in *Chernekov v. U.S.A.*, 9 Cir., 1955, 219 F.2d 721, held that *two* opportunities must be given the selectee, who refuses to submit, because the pertinent army regulation says so [724-725].

Next, Judge Jertberg, in *U.S.A. v. Lindsay*, S.D. Calif. 1958, No. 3496-ND, held that the selectee must be given an explicit *and detailed* warning of the penalty, because the pertinent regulation says so. Since the opinion is unreported (and has been persuasive to others: see *U.S.A. v. Dalmatoff*, S.D. Calif. 1958, No. 3493, Judge Westover) it will be quoted, at some length.

After quoting the letter of the induction officers to the United States Attorney (the predecessor of the one subsequently adopted and used at present: see pp. 65-66 of the government's exhibit) Judge Jertberg said:

"It is to be noted that the letter states that the defendant was informed that refusal 'constitutes a felony under the provisions of the Selective Service regulations and that conviction would subject him to punishment'. It omits to state that the defendant was informed that the punishment might be 'by imprisonment for not more than 5 Years or a fine of not more than \$10,000.00 or both'. No other evidence appears in the record concerning the circumstances surrounding the defendant's refusal to submit to induction, except said letter.

"In *Chernekov v. United States*, 219 F.2d 721 (Ninth Circuit), the court stated at page 725, referring to the Army regulations:

'One purpose of this regulation is self-evident. It is intended to give a registrant a last clear chance to change his mind and accept induction rather than certain indictment and possible conviction for a felony carrying a maximum punishment of five years or a fine of not more than \$10,000.00 or both. The regulation is couched in mandatory, not discretionary, language.'

"The plaintiff contends that in the absence of evidence to the contrary, it must be presumed that the defendant was advised by the induction officials that the offense of refusing to submit to induction would subject the defendant to punishment by imprisonment for not more than 5 years or a fine of not more than \$10,000.00, or both, because of the presumption that public officials perform their duties according to law. The vice in this argument is that even if the letter (Plaintiff's Exhibit No. 1, page 21) does not overcome the presumption of regularity in showing that the induction officials did not follow the regulation, the letter raises a reasonable doubt that the regulation was followed. This doubt might have been overcome if the government had elected to call as witnesses the induction officials who might have testified that the warning given the defendant included the nature and extent of the possible punishment. The government, however, elected to stand on the Selective Service file. It may well be that if the defendant had been advised of the severity of the punishment that he would have changed his mind. As the Court in the *Chernekov*

case, at page 725, stated: 'It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulation to seriously reflect and to let actions speak louder than words.'

"In this case, the defendant is presumed to be innocent until his guilt has been established beyond a reasonable doubt. Under the evidence in this case, and giving to the defendant the presumption of innocence to which he is entitled, I am compelled to state that I have a reasonable doubt that the defendant was given the required warning. The warning given him simply stated that conviction would subject him to punishment. He was entitled to know the severity and extent of the punishment which might have had the effect of causing the defendant to change his mind."

In the Wolfe case the flat, clear testimony of the induction officer was that the regulation was *not* followed even though the printed form [pages 65-66] used by the induction officer in *reporting* the event unmistakably showed that the warning *was to be between* the opportunities. At stake is the integrity of the pertinent law. If military men are to be permitted to use their own judgment as when and how they are to follow clear, simple regulations pertaining to changing the status of civilians to military life our civilian life is in jeopardy from further encroachment. It is better that they be held strictly to account in this area than to be concerned over the "loss" of one or two recruits, men who, because of conscientious objections, the army would never get anyway.

CONCLUSION

For the reasons above stated, the judgments of the district courts should be reversed and orders entered directing the district courts to render and enter judgments of acquittal.

Respectfully submitted,

J. B. TIETZ,

Attorney for Appellants

JUNE 14, 1966

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ,

Attorney for Appellants

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH CARL PARROTT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH CARL PARROTT,

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vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant Joseph Carl Parrott was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on October 27, 1965, in Case No. 35430-CD. [C. T. 2]^{1/} The Indictment charged a violation of Title 50, App., United States Code, Section 462, Universal Military Training & Service Act; Refusal to Perform Civilian Work Assignment.

On November 8, 1965, appellant was arraigned before the Honorable E. Avery Crary, United States District Court Judge, and entered a plea of not guilty. [C. T. 4]. Appellant was represented by counsel at all stages of the proceedings. On November

^{1/} "C. T. " refers to Clerk's Transcript of Record.

22, 1965, Case No. 35430-CD was called for trial before the Honorable Peirson M. Hall, United States District Court Judge. Trial by jury was waived. [R. T. 4]^{2/} On the same date, appellant was found guilty as charged [R. T. 13]. On December 6, 1965, appellant was sentenced to the custody of the Attorney General for a term of three years [C. T. 15]. A timely notice of appeal was filed on December 6, 1965 [C. T. 18].

Jurisdiction of the trial court was founded upon Title 50, Appendix, United States Code, Section 462, and Title 18, United States Code, Section 3231. This court has jurisdiction pursuant to Title 28, United States Code, Sections 1291, 1294.

II

STATUTES INVOLVED

Title 50 Appendix, Section 462, United States Code, provides in pertinent part as follows:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the

^{2/} "R. T. " refers to Reporter's Transcript of Record.

armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both . . . "

Title 50 Appendix, Section 456(j) states:

"(j) Conscientious objectors. -- Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service ,

because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of Section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."

III

STATEMENT OF FACTS

At the time of trial of this case the certified photocopy of the appellant's selective service file was offered and admitted into evidence as Government's Exhibit No. 1 [R. T. 4-7]. This file and the testimony of appellant during trial revealed the following events with respect to appellant's registration status in the

Selective Service System:

Appellant registered with Local Board No. 134 (hereinafter referred to as the "Board") in Orange County, on March 6, 1961 (pp. 1, 2). ^{3/} The Board assigned appellant the following classifications on the dates indicated:

April 13, 1964 -- Class I-A;

February 11, 1965 -- Class I-O. (p. 2).

On February 18, 1965, the Board mailed to appellant for completion the form entitled Special Report for Class I-O Registrants (SSS Form 150). On March 15, 1965, the appellant returned this questionnaire to the Board along with a letter which stated, inter alia, "That by accepting civilian work I would also be participating as a noncombatant with the Armed Forces. It is my belief that in the event of war any job which I hold, that may have been held by someone else, would be freeing that person for combat just as in World War II, the United States used many men to perform duties that were normally handled by men."

On April 22, 1965, the Board mailed a letter to appellant which offered appellant a choice of three different types of civilian work which appellant could perform in lieu of induction. Appellant never returned this letter. On June 15, 1965, pursuant to order of the Board, appellant met with members of the Board and a representative of the State Director of the Selective Service. At this meeting appellant was questioned at length about his refusal

^{3/} Refers to pages of Appellant's Selective Service File, Government's Exhibit No. 1.

to accept any type of work and was asked whether or not he wished to see a list of other jobs that were available in addition to the three enumerated in the Board's letter of April 22, 1965. Appellant stated that he did not wish to see the list and that he was refusing to accept any type of work. Appellant signed a statement to this effect (pp. 88-89).

Thereafter, on August 2, 1965, the Board ordered appellant to report for civilian work assignment at the Los Angeles County Department of Charities, 1200 North State Street, Los Angeles, California, where work as an institutional helper was available for appellant (p. 96).

On August 3, 1965, appellant reported for work at the Los Angeles County Department of Charities, however, at that time he refused any and all civilian work assignments (p. 97).

IV

QUESTIONS RAISED ON APPEAL

1. Did the trial court err in admitting in evidence the Selective Service File of the appellant?
2. Was there a basis in fact for the Local Board's rejection of the classification claim of appellant?

ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED
INTO EVIDENCE THE CERTIFIED PHOTO-
GRAPHIC COPY OF THE APPELLANT'S
OFFICIAL SELECTIVE SERVICE FILE.

Rule 44(a), Federal Rules of Civil Procedure, provides that an official record of an entry therein, when admissible for any purpose, may be evidenced by a copy attested by the officer having legal custody of the record, and accompanied with a certificate that such office in which the record was kept is within the United States. The certificate may be made by any public officer having a seal of office and having official duties in the political subdivision in which the record is kept, authenticated by a seal of his office.

Title 28, United States Code, Section 1733, provides that records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction, or occurrence as a memorandum of which the same were made or kept. Rule 1733 also provides that properly authenticated copies of any books, records, papers, or documents of any department or agency of the United States shall be admitted into evidence equally with the originals thereof.

Rule 27, Federal Rules of Criminal Procedure, provides that an official record or any entry therein may be proved in the same manner as in civil actions.

Appellant contends that the trial court erred by admitting

into evidence the bound photographic copy of his original selective service file. This document had been attested and certified in compliance with the above-mentioned rules of procedure (See Government's Exhibit No. 1).

It is not clear on what grounds appellant contends that the document fell short of conformance with the applicable laws. He cites no case law to support his unique interpretation of Rule 44(a), Federal Rules of Civil Procedure, and Section 1733, United States Code, Title 28, nor does he specify what section of the statutes make certified copies of appellant's selective service file inadmissible.

This Circuit has previously approved the proposition that a duly authenticated copy of the registrant's Selective Service file is admissible in a prosecution for violation of Title 50, Appendix, United States Code, Section 462.

Yaich v. United States, 283 F.2d 613 (9th Cir. 1960);

Kariakin v. United States, 261 F.2d 263 (9th Cir. 1958);

LaPorte v. United States, 300 F.2d 878 (9th Cir. 1962);

Olender v. United States, 210 F.2d 795 (9th Cir. 1954).

See also: United States v. Borisuk, 206 F.2d 338 (3rd Cir. 1953).

Appellant implies that the only way to properly introduce a registrant's selective service file into evidence is to bring in to

court each and every individual who has at one time worked on the file, or had the file in his office (Opening Brief, 7-8). Such a procedure would uselessly impede the swift trial of such cases, and would clearly conflict with the purpose of Section 1733, Title 28, United States Code.

Wong Wing Fee v. McGrath, 196 F.2d 120, 123
(9th Cir. 1952).

B. APPELLANT WAS PROPERLY CLASSIFIED
I-O WHEN HE WAS ORDERED TO REPORT
FOR CIVILIAN WORK.

A court may not interfere with a registrant's classification unless it finds that there is no basis in fact for the classification or that the Local Board acted so arbitrarily and capriciously that the registrant was denied due process.

Witmer v. United States, 348 U.S. 375, 381 (1955);
Dickinson v. United States, 346 U.S. 389 (1953);
Estep v. United States, 327 U.S. 114, 122 (1946);
Cox v. United States, 332 U.S. 442, 448 (1947);
Rogers v. United States, 263 F.2d 283, 285 (9th Cir.
1959).

A "basis in fact" means one having significance within the legal framework governing selective service classifications.

Badger v. United States, 322 F.2d 902, 907 (9th Cir.
1963)

In Dickinson v. United States, supra, -- which the appellant

relies on so heavily -- the Supreme Court quoted with approval the following language from Estep v. United States, 327 U.S. 114, 122-123 (1946):

" . . . The courts are not to weigh the evidence to determine if the classifications made by the local boards are justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave to the registrant. "

Dickinson involved a Jehovah's Witness who was classified I-A after he had qualified and been certified as a "Pioneer Minister" of that Sect, devoting over 150 hours per month to his ministerial work. The Supreme Court reversed the Ninth Circuit's upholding of the I-A classification, and ordered the petitioner classified IV-D.

"The task of the Court in such cases is to search the record for some affirmative evidence to support the local board's finding that a registrant has not painted a complete or accurate picture of his activities. "

Dickinson v. United States, supra, 396.

See also: Witmer v. United States, 348 U.S. 378 (1955)

Although no such evidence was found in Dickinson, it is submitted that it was plentiful in appellant's case. Careful examination by an appeal examiner disclosed that appellant could not be considered a regular or duly ordained minister of religion.

"Each registrant must satisfy the [Selective Service] Act's rigid criteria for the exemption. Preaching and teaching the principals of one's Sect, if performed part-time or half-time, occasionally or irregularly, are insufficient to bring a registrant under No. 6(g). These activities must be regularly performed. They must, as the statute reads, comprise the registrant's 'vocation'. And since the ministerial exemption is a matter of legislative grace, the selective service registrant bears the burden of clearly establishing a right to the exemption."

Dickinson v. United States, supra 395; quoted in Badger v. United States, supra at 906.

Appellant cites no cases where a Jehovah's Witness, doing the amount and type of work done by appellant, was given a minister's classification. On the contrary, a number of courts have refused to award IV-D classifications to Jehovah's Witnesses performing work similar to appellant's, but not "Pioneer Ministers".

Fitts v. United States, 334 F.2d 414 (5th Cir. 1964);

United States v. Tettenburn, 186 F.Supp. 803;

United States v. Kezmes, 125 F.Supp. 130

(D. Penn. 1954).

"Certainly all members of a religious organization or Sect are not entitled to the exemption by reason of their membership, even though, in their belief, each is a minister."

Dickinson v. United States, supra, 394.

VI

CONCLUSION

For the reasons stated, the trial court's decision should be affirmed.

Respectfully submitted,

MANUEL L. REAL

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez
GABRIEL A. GUTIERREZ

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

| | | |
|--|---|-----------|
| JOSEPH CARL PARROTT, <div style="text-align: right;"><i>Appellant,</i></div> | } | No. 20730 |
| vs. | | |
| UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Appellee.</i></div> | } | |
| | | |
| ROBERT ALAN LAWRENCE, <div style="text-align: right;"><i>Appellant,</i></div> | } | No. 20746 |
| vs. | | |
| UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Appellee.</i></div> | } | |
| | | |
| TERRY ALLAN WOLFE, <div style="text-align: right;"><i>Appellant,</i></div> | } | No. 20926 |
| vs. | | |
| UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Appellee.</i></div> | } | |
| | | |
| LEONARD RALPH WALKER, II, <div style="text-align: right;"><i>Appellant,</i></div> | } | No. 20927 |
| vs. | | |
| UNITED STATES OF AMERICA, <div style="text-align: right;"><i>Appellee.</i></div> | } | |

APPELLANTS' CLOSING BRIEF

FILED

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APPELLANTS' CLOSING BRIEF

I.

THE EVIDENCE ADMISSION POINT

The government's main contentions here are three:

(1) That "this circuit has previously approved the propo-

sition that a duly authenticated copy of the registrant's Selective Service file is admissible in a prosecution for violation of Title 50, Appendix, United States Code, Section 462"; (2) that admission of the various Selective Service files was in conformance with the applicable law; and (3) that appellants' position is that the only proper manner to introduce such a file is to bring into court each and every individual who has worked on it.

Our reply is (1) that none of the cases cited by the government is binding precedent governing these appeals because those of their cases that are in point recite mere dictum; (2) the various files were not admitted in conformance with the applicable laws because they were not authenticated as required by Rule 44, Federal Rules of Civil Procedure; and (3) that the government misconstrues appellants' position regarding the proper manner of introducing such files.

(1) We will take the government's cited cases one at a time and demonstrate why each is not binding precedent determining these appeals. Please note that in three of the present appeals no live witness whatsoever was used and that in the fourth (Walker) the witness's testimony shows that he was not in fact the person in physical custody of the records.

Yaich v. United States, 283 F.2d 613 (9th Cir., 1960): Here appellant did not object to the introduction of the entire file but objected specifically to two pages in the file which, he contended, were without proper foundation. The only statement in the case relating to admissibility of the entire file is:

"Before considering appellant's first specification of error it may be well to note that as a general rule in prosecutions for violation of the Universal Mili-

tary Training and Service Act, the Selective Service file of the delinquent registrant is admissible into evidence as a public document under the provisions of Title 28, U.S.C.A., Section 1733. . ." [616]

Thus the phrase itself indicates that it is mere dictum, not a point seriously in contention because not raised by proper objection to evidence and argued before the Court of Appeals. It is stated as an aside "Before considering appellant's first specification of error."

The cases cited in support of this dictum (Penor, Ward, Borisuk and Kariakin) will be dealt with hereinafter.

Moreover, this court's records in the Yaich case will show that defense counsel stipulated to the admissibility of all of the file except page 186 thereof, to which the defendant objected (See Yaich, No. 16,641, Reporter's Transcript, page 9).

LaPorte v. United States, 300 F.2d 878 (9th Cir., 1962): Again the objection was not to the admission of the entire file but to one page of the file, Form 153, a communication from the Department of Charities to the Selective Service System. In this case, the document in question was identified and explained by an employee of the Department of Charities who was personally called as a witness for that purpose. It should be noted that this witness testified extensively about the nature and preparation of the documents.

Kariakin v. United States, 261 F.2d 263 (9th Cir., 1958): Here too, the only part of the case in point is mere dictum:

"The file was admitted into evidence without objection by his experienced counsel." (page 265)

Thus, the point raised by our appeal was not reached. The Court in Kariakin is merely reciting obiter the statement that follows because that point was not properly in issue:

“ . . . Regardless of whether his counsel had made objection, the file was admissible as an official record under Rule 44, Federal Rules of Civil Procedure, 28 U.S.C.A.”

The only objections made, and thus the only points decided, were as to the allegedly hearsay nature of some specific entries in the file. The records of this Court show that the file was admitted by stipulation of trial counsel.

Olender v. United States, (9th Cir., 1954) 210 F.2d 795: This case is an income tax evasion case, not a Selective Service case. The government submitted a file maintained by the Fresno County Department of Public Welfare to prove statements by defendant therein contradictory to his position at trial. The evidence was offered through the testimony of a Fresno County employee who was called as a witness for the purpose of identifying and explaining the file offered. Thus, far from supporting the government's contention on this appeal, this case supports the appellants' contention by demonstrating the proper method of “attesting” such a government record.

United States v. Borisuk, 206 F.2d 338 (3rd Cir., 1953):

Again, the case does not support the government's present contention that a Selective Service file is properly receivable in evidence without any testimonial foundation other than the purported signature of the purported and unexamined custodian. In this case, the court held that the file was properly admitted despite the fact that no member of the local board testified. The board file had been introduced through the testimony of the secretary of the board instead (page 340). The court held this to have been sufficient foundation.

In addition to those cases cited by the government, the Yaich case cites two others, neither of which decides the issue raised by this appeal:

Penor v. United States, 167 F.2d 553 (9th Cir., 1948): Here the court states simply that the file was sufficiently identified without elaborating on what method of identification was used.

United States v. Ward, 173 F.2d 628 (3rd Cir., 1953): Here, the government called the clerk of the office of Selective Service records to identify the files offered in evidence. She also testified as to the procedures of the board and was cross-examined on all points by defense counsel.

(2) The government's brief begs the question when it recites several times that "duly authenticated copies" are admissible. Our point here is that the files in these appeals were not "duly authenticated."

Title 28, U.S.C., Section 1732, states that records made in the regular course of business shall be admissible into evidence. It is silent on the question of how such records are to be authenticated.

This circuit has held that a foundation must be laid for admissibility under this section. *Bisno v. United States*, 299 F.2d 711.

Title 28, U.S.C., Section 1733, provides that government records and papers may be admitted into evidence to prove the transactions recorded therein. It goes on to state that "properly authenticated copies . . . shall be admitted in evidence equally with the originals thereof." It nowhere states what constitutes proper authentication.

Rule 44, Federal Rules of Civil Procedure, is made applicable by Rule 27 of the Federal Rules of Criminal Procedure. This rule states how an official record shall be authenticated:

“. . . may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record *and* accompanied by a certificate that such officer has the custody. . . .” (Emphasis supplied).

We contend that the files in the Parrott, Lawrence and Wolfe cases were not duly authenticated because the copies offered were not attested by a witness present in court. Rule 44 requires both an attestation and a certificate. In these cases there was a certificate alone unless the attestation requirement is satisfied by the mere signature of the purported custodian.

The word “attest” is equivocal and varies from context to context. It is defined as follows by Webster’s New International Dictionary, Second Edition, page 178:

“Attest, v.,

“1. To bear witness to; to certify; to affirm to be true or genuine; specif., to witness and authenticate by signing as a witness; also, to authenticate officially; as, to attest the truth of a writing or record.

“4. To put one on oath or solemn declaration.

“Attest, intransitive verb

“1. To bear witness, to testify.”

Thus, in some contexts the word connotes a written authentication and in other contexts the word connotes a verbal or testimonial authentication.

Black’s Law Dictionary, 4th Edition, page 163, defines “attest” variously in a similar fashion.

To preserve the constitutionality of the statute, as applied to cases such as these, the word “attest” must be interpreted to mean “to testify in court.” This point will

be developed below in connection with our discussion of appellee's third major contention.

In appellant Walker's case, we contend that the files were not "duly authenticated" because the actual custodian did not attest them. The certificate said one Captain Proffit was the custodian. The witness, Major Miller, testified that he himself was the custodian. His further testimony showed that neither man had the files under his control and that in the regular course of business the files were kept in the local board office. There, the clerk of the local board has control of them.

The records of this Court show the following: in the first two decades of draft prosecutions the clerk of the local board was always considered the custodian [see the certification on *every* exhibit] and the prosecution made out its case either by bringing her into court or by securing a stipulation that, if on the witness stand, she would testify the photocopy was a true, full and correct copy of the original and that the original was a true, full and correct record of the defendant's Selective Service history. See either the record and/or the opinion of *Affeltdt v. U.S.*, No. 13941; *Ashauer v. U. S.*, No. 14304; *Berman v. U. S.*, No. 10953; *Cherneckoff v. U. S.*, No. 14370; *Clark (A.P.) v. U. S.*, No. 14634; *Clark (R.) v. U. S.*, No. 14176; *Dickinson v. U. S.*, No. 13165; *Elder v. U. S.*, No. 13405; *Franks v. U. S.*, No. 14114; *Gallegos v. U.S.*, No. 16725; *Hinkle v. U.S.*, No. 14163; *Kaline v. U. S.*, No. 14635; *Linan v. U. S.*, No. 13404; *Mason v. U. S.*, No. 14286, etc., etc. Cf. *Sterrett v. U. S.*, 9 Cir., 1954, 216 F.2d 659, on the subject of the weight to be given long standing administrative practice (at 664-665).

(3) As its third major point, the government states that appellant implies ". . . that the only way to properly introduce a registrant's Selective Service file into evidence is to bring into court each and every individual who has

at one time worked on the file or had the file in his office" (Appellee's Parrott Brief, pp. 8-9).

Our Opening Brief set forth the conflict between the purported authenticating certificate on appellant Walker's file and the testimony of the witness, Major Malcolm Miller and that his further testimony shows that the local board office actually had the file most of the time. This is all that was meant or should be implied from that argument.

That which we do contend is two-fold: First, that the file must be attested by the officer actually having custody of the records, and second, that this officer must be produced in court so that he might be cross-examined on the fact of his custodianship, on the correctness of the photo copy, on the regularity of the preparation of the documents—both the originals and the copies—and on any discrepancies or irregularities appearing on the face of the file.

Far from being a useless impediment to swift trial of such cases as the government alleges, such cross-examination is vital to an adequate defense.

Many defendants in cases such as these come into court in a crippled condition. Some failure to observe the strictly enforced time limits, or dismay over the involved bureaucratic intricacy of establishing conscientious objector status has led them into a procedural error which has caused the System to foreclose their claims like the jaws of an iron trap. These young men ultimately find themselves facing the dilemma of having to stand trial in hopes that the prosecution will somehow abort and give them a chance to again approach the system with the assistance of the experienced legal counsel for which they now appreciate the need.

Thus, heavy reliance must be placed by trial counsel for these defendants on some failure of the Selective Service System, or of the induction officials, to observe the requirements of due process of law. They may be denied due process when the induction personnel feel that they will refuse induction. They may get short shrift on medical exams, security tests, etc. These are among their potential defenses. But without opportunity to cross-examine the persons who make the record against them—who do not ordinarily include information concerning the short-cuts they have taken and the corners they have cut—these defendants are deprived of an opportunity to make their full defense through the development of all the facts, in their true perspective. Furthermore, our system does not place upon a defendant the burden of producing the prosecution witnesses in court.

Ordinarily, in a criminal case, the prosecution must put on a *prima facie* case *in the face of* cross-examination by defense counsel. Here, however, the prosecution merely submits a file, replete with notations made by unknown hands, medical opinions of men whose care and expert qualifications are in no way established by the record presented and whom counsel has no opportunity to take on *voir dire*, a jumbled mass of mixed fact and opinion by declarants whose competence, bias or prejudice defense counsel is denied any chance to explore.

In an analogous type of situation, this court in *Chernekoff v. U. S.*, 9 Cir., 1955, 219 F.2d 721, said “. . . he was like a blind man striking at an invisible foe.” (724).

The code sections quoted above merely codify well known exceptions to the rule prohibiting hearsay evidence. Such exceptions are justified by their practical necessity and by the existence of some badge of authenticity about the particular hearsay evidence being introduced.

Here, there is no necessity for the introduction of these files without even the personal testimony of the custodian to identify and explain them. It is at best a matter of mere expedience on the part of the federal attorneys. At worst, it is an attempt to convict on inadequate but unimpeachable evidence—evidence unimpeachable because there is no opportunity to cross-examine and dig behind the surface of the files.

The badge of authenticity that usually justifies the admissibility of government records is the common experience that such records are ordinarily kept in a regular manner by professionally unbiased employees. Usually they amount to but a single document or a small package of documents that form but some link in the chain of evidence.

Here, the documents are the government's entire case.

Here, the badge of authenticity is almost entirely lacking. We are dealing not with the usual situation but with military personnel and pro-military civilians handling men who claim and profess conscientious objections to war and who morally condemn the very activities that constitute the life's work of the employees making the notations. Far from the usual case of unbiased objectivity, these officials are typically filled with what might charitably be called an occupational aversion toward these defendants.

Yet the procedure used here deprives defense counsel of any opportunity to cross-examine any of the entrants to determine the depth and extent of their bias and prejudice against the defendants and whether or not it has been reflected in their evaluations of them.

The Constitution of the United States, Amendment VI, states:

“In all criminal prosecutions the accused shall enjoy the right to . . . be confronted with the witnesses against him . . .”

Against the imperative command of this part of our Constitution, the government places the alleged necessity of prosecuting a defendant for a serious federal felony by means of this hearsay record alone without so much as producing a single witness to identify and explain the documents.

The government cites one case in support of this alleged necessity, *Wong Wing Foo v. McGrath*, 196 F.2d 120, 123, wherein the 9th Circuit states obiter the reasons for the exception to the hearsay rule codified in Section 1733, in an opinion which holds testimony of a witness in a prior hearing inadmissible under that section even though it was part of an official government record. The court, there, states the two principal reasons:

“There is a practical necessity for the use of such records to which is attached the presumption of a proper performance of official duty.”

Here the practical necessity is absent, for all these appellants ask is that the official custodian of the records be produced in court, hardly an overwhelming burden on the government. Furthermore, the presumption of official regularity is sufficiently rebutted by the special circumstances of draft cases discussed hereinabove—the passions and prejudices that the nature of the claims arouses in the officials.

The one case found by counsel that stands for the proposition that the business records exception does not violate the Sixth Amendment is *United States v. Leathers*, (.....Cir., 19....) 135 F.2d 507. It holds that the criminal defendant was not unconstitutionally deprived of the right

of cross-examination of witnesses against him when one single air mail stamp was introduced into evidence from the records of a bank to prove that a letter had been sent through the mail. The court stated:

“ . . . it is not necessary to say what limits the Sixth Amendment may set to the extension of exceptions to the rule against hearsay. Probably the permissible extension is a matter of degree.”

It is a far cry from one air mail stamp to the voluminous collections of notations, remarks and opinions that these Selective Service files represent. We submit that the permissible limit of extension was reached and passed long before the complexity and need for explanation that these files present was reached.

We contend that the former practice of the government in prosecuting draft cases was correct.

The clerk of the local board was the official who actually kept the records in her custody and had personal knowledge of their contents and the regularity of their preparation and transcription. She should be required to be present in court to lay the foundation for admission of the file.

Perhaps no single court opinion sums up all the contentions of the parties as well as *Doty v. United States*, 8 Cir., 1955, 218 F.2d 93:

“Lastly, it is asserted that the record and files of the draft board were improperly received in evidence because they were not properly identified. The clerk of the local board identified the records and files in question as the record and files of the local board. The clerk was the custodian of those records. They were properly received in evidence.” [96].

This procedure was more equitable and fair to the defendants since they then had the opportunity, through

cross-examination, to dig behind the surface of the file and expose the latent defects therein.

Since these are criminal cases and since the government has the burden of proving its case beyond a reasonable doubt, we submit that these files should not have been admitted into evidence without the foundation testimony of their custodian and that the actual custodian is the clerk of the local draft board.

II.

THE NO-BASIS-IN-FACT POINT

Appellee labels its discussion of this subject "Appellant was properly classified."

1. Parrott's case (pages 9-12, Appellee's brief).

All appellee recites on page 9 is indisputable but on page 10 deeper water is reached. To start our rebuttal argument we will adopt appellee's statement concerning the "language from *Estep v. United States*, 327 U.S. 114, 122-123 (1946)" and add only *underscoring*:

" . . . The courts are not to weigh the evidence to determine if the classifications made by the local boards are justified. The decisions of the local boards *made in conformity* with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is *no basis in fact* for the classification which it gave to the registrant."

Continuing our argument that appellee is in error we point out, as an illustration of it, that the following statement on page 10 is a complete misconception of the role of the court and inconsistent with the law already cited by appellee: "The Supreme Court reversed the Ninth Circuit's upholding of the I-A classification, and *ordered the petitioner classified IV-D.*"

Additionally, appellee says (page 11) "Although no such evidence was found in Dickinson, it is submitted that it was plentiful in appellant's case. Careful examination by an appeal examiner disclosed that appellant could not be considered a regular or duly ordained minister of religion." None of the alleged "plentiful" evidence is recited, not an iota. Who the "appeal examiner" is is left to our speculation.

Appellee closes his argument with a good thrust: "Appellant cites no cases where a Jehovah's Witness, doing the amount and type of work done by appellant, was given a minister's classification." (page 11)

In the Fifth Circuit case of *Wiggins v. United States*, 261 F.2d 113, the court points out that ministers who must earn their daily bread in secular work must devote the time to a job that the boss requires (p. 115) and concludes:

"He has shown that he performed his religious duties regularly, without allowing his secular work to interfere with his religious work. We hold that a crane operator working a forty-hour week may be a minister in Jehovah's Witnesses and entitled to the ministerial exemption under the Selective Service Act, although spending only forty hours a month on religious duties."

In appellee's final thrust, *Dickinson v. United States*, 346 U.S. 389 (1953) is quoted:

"Certainly all members of a religious organization or Sect are not entitled to the exemption by reason of their membership, even though, in their belief, each is a minister."

The position of the witnesses can be briefly stated: We are missionaries, not mere members of a congregation; we give all the time we can to our scriptural ministry; when we meet the standard that the law sets for this government agency (the Selective Service System) we expect to be considered seriously for the IV-D, minister's classification.

2. The other appellants (all of whom wanted the I-O, conscientious objector classification):

Appellee argues that the "lateness" of appellants' claims for a conscientious objector classification make their claims "irrelevant" to the question of guilt.

We argue that this deadline-insistence attitude violates the intent of the act and common sense.

Congress intended classifications to be made on a fair and just basis. Even the regulations so state. See Section 1622.1(b), quoting the act. Further, Congress singled out the registrant professing conscientious objections for preferential treatment, creating a careful appellate process for him, and by an independent agency (the Department of Justice), one not under pressure to meet quotas and one professional in its attitude.

Moreover, common sense dictates that needlessly rigid use of "deadlines" is wrong:

It is well understood that few persons cross a bridge until they come to it. This is even more true of the population in the 18-22 age bracket.

Fox-hole conversion is applauded by the clergy. Crystallization of conscientious objector beliefs, upon receipt of a Selective Service notice to report, is equally understandable and respectable. In any event the tiny percentage of registrants taking an anti-war position (12,000 out of 32,000,000 registrants) as shown by the charts in each month's issue of Selective Service, a tabloid published by the Selective Service System, certainly indicates that a fair consideration of such religious claims cannot possibly disrupt the raising of armies.

The records in these three, pacifists', cases show none had an appellate determination of his claim. Of the three,

only Wolfe had an opportunity to meet a board member face to face and his meeting was only a "courtesy interview", a creation of the System that forecloses an administrative appeal. It was not an Appearance Before Local Board, as set forth in the regulations, § 1624. 1 *et seq.*

Since Wolfe had the best "opportunity" we will dwell on it. He made out a *prima facie* case. What does appellee have to say on this, the "merits?" On page 15 it is said "Series VIII of the questionnaire (page 7) does not reflect a claim to be a conscientious objector." Our answer is: the law doesn't require it; of course, it is helpful to a registrant if his opinions are crystallized in high school, so that in his first written statement to the System, at age 18, he can sign Series VIII. Nevertheless, the law recognizes change of status. The regulation, § 1625.1(a), says "No classification is permanent."

There is no other comment, by appellee, on the merit of this appellant's conscientious objector evidence. Only that it should be disregarded.

The *prima facie* case of Wolfe is found in the numerous letters and statements in the exhibit. See pages 40, 61-62, 66 and particularly in his fully executed Special Form (2) for Conscientious Objector, pages 42-46, and 48-51.

The *prima facie* case of Lawrence is in the exhibit, in his record, Special Form for Conscientious Objector, pages 35-44 and in letters throughout the record.

The *prima facie* case of Walker is in the exhibit in his record, as follows: page 59, he requested the Special Form for Conscientious Objector and on page 62 is a repeated request:

Section 1621.11 of the regulation is couched in mandatory language. It contains no "deadline" language, nor grant of discretion to the all-powerful clerks. It reads:

1621.11 Special Form for Conscientious Objector. A registrant who claims to be a conscientious objector shall offer information in substantiation of his claim on a Special Form for Conscientious Objector (SSS Form No. 150) which, when filed, shall become a part of his Classification Questionnaire (SSS Form No. 100). The local board, upon request, shall furnish to any person claiming to be a conscientious objector a copy of such Special Form for Conscientious Objector (SSS Form No. 150).

The reporter's transcript in Walker's record shows that this defendant was precluded by the trial court from showing what he had to offer, 36/23. By proffer (38-) it was shown that he could testify to a *prima facie* case (44) and the details of it is in the record as Defendant's A, for identification, (not admitted, 45/14) a 19 page documentation.

We contend the above young men were unnecessarily given too short shrift.

Our contention is best stated by the language used in the Fifth Circuit case of *Williams v. U. S.*, 5 Cir., 1954, 216 F.2d 350:

"Congress in its wisdom considered it more essential to respect a man's religious belief than to force him to serve in the armed forces. The draft boards and the Courts are bound to carry out that policy." (352)

Our contention is sustained by the August, 1966 decision of Judge Albert Lee Stephens, Jr., in the case of *U. S. A. v. Curran*, No. 36248, Central District of California. This defendant first filed his conscientious objector form after the issuance of the Order to Report for Induction. Defendant argued he should have had consideration of his claim. The trial judge stated:

"I don't understand exactly the Government's determination to prosecute this case if there is a failure of the Draft Board to consider the issue of whether he is or he isn't a conscientious objector, whether it is a technicality or it isn't, when he is willing to do this other work. I think we asked the Government if they would do it, and they came back and said no, they wanted to prosecute.

"Well, I do have some question in my mind about what the Draft Board ought to have done in that case. Let's hear from the Government if they have any more to say."

The United States argued that the board decided not to reopen. The Court said:

"THE COURT: And if they come to the conclusion, if they do their duty, they make their determination, and they let him have his appeal. He is ruled against, then I don't think he has anything he can complain about. I think that the Government is bound to prosecute.

"But, on the other hand, where they haven't come to that conclusion, and they have ducked it on a technicality, which as I look at it now may really be a serious question of whether or not they were deciding the issue in their own minds that he was or he wasn't a conscientious objector—in other words, if the Draft Board said to each other, and we don't know what they said, but if the members had said to each other, 'Well, this guy is a Jonnie come lately. He just made up his mind to be a conscientious objector overnight. He has been trying to duck the draft. Everything he has done here shows that. So we don't believe he is a conscientious objector.'

"So if that's what they said, they are wrong. Because to that type of a determination he has the right of an appeal."

After further argument the Court concluded:

“THE COURT: Well then, I think that that’s their determination. And he has a right to an administrative appeal from it. I find the defendant not guilty.

“Now, this is an unpopular decision, as far as I am concerned. It is unpopular with me. The defendant isn’t popular with me for this attitude. But I think he is entitled to this decision, and I think he should go back—I mean the Draft Board ought to reconsider it.”

This is what each appellant wants.

III.

THE REOPENING POINT

Most of appellee’s briefing is devoted to upholding the deadlines set up by this agency’s regulations. A strict construction of the regulations on “reopening” a classification is urged.

This court has already established a guide line that applies here, namely that the local board’s method of changing the induction date may be the equivalent of a reopening and a renewal of the registrant’s opportunities to submit a change of status. In *Hamilton v. Commanding Officer*, 9 Cir., 1964, 328 F.2d 799, it was reasoned in an analogous situation (but weaker, because Hamilton was a civil case and the burden was on him):

“The regulations allowing a personal hearing if request is made within ten days after classification³ do not permit an extension because of failure to have one’s mail promptly attended to and forwarded.⁴ Further, after the order for induction was mailed, there would ordinarily be no right to be heard.⁵

“But in our view the board did subsequently cancel its order to report by its postponement on March

6, 1963, 'until further notice' of induction. Thus, after March 6, he was entitled to submit any proof of change of circumstance⁶ since his last classification of February 6, 1963." (802)

The record of Wolfe's appeal shows the following:

June 30, 1965 he was sent his Order to Report for Induction (39).

July 3, 1965, he applied for a conscientious objector classification (40).

On July 26, 1965 he was sent a communication stating "1. By authority of State Director—TALB dated Feb. 18, 1964 your induction into the armed forces heretofore fixed for July 27, 1965 in Order to Report for Induction (SSS Form No. 252) issued by this local board on June 30, 1965 is hereby POSTPONED until further notice.

"You will be advised by this local board as to the date you will present yourself to this board for delivery for induction after termination of this postponement." (52)

The other appellants do not have such clear-cut cases, on this (reopening) point, and our argument on this point is limited to Wolfe's appeal.

IV.

OTHER POINTS

None preserved by the record, and briefed, are waived merely because not further argued in this Closing Brief.

Respectfully,

J. B. TIETZ AND

MICHAEL HANNON

Attorneys for Appellants

No. 20,737 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

D. R. KINCAID, LTD. and THOMAS A.
GIULI, doing business as KINCAID-
GIULI JOINT VENTURE,

Appellants,

VS.

TRANS-PACIFIC TOWING, INC., BROKERS,
INC., and CLARENCE C. T. LOO,

Appellees.

Appeal from the District Court of the United States
for the District of Hawaii

Honorable C. Nils Tavares, Judge

BRIEF OF APPELLANTS

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IN THE

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Honorable C. Nils Tavares, Judge

BRIEF OF APPELLANTS

JURISDICTION

This appeal is from a final decree in personam in Admiralty, brought by Appellants against Appellees, alleging a breach of a towing contract by Appellees.

In their Libel, Appellants alleged that the contract which is the subject of this action was one whereby the Appellees agreed to provide their tug and barge

for a round trip voyage from Honolulu, Hawaii, to Midway Island, Kure Atoll, and return to Honolulu. They alleged a breach of this contract of towage.

The United States District Court for the District of Hawaii had jurisdiction over the parties, as Appellants were a joint venture, consisting of a Hawaii corporation and an individual resident of the State of Hawaii, and the principal Appellee was an individual resident of Hawaii. (Record pp. 3-4). The subject of the action to wit, a contract of towage was maritime in nature. (Record pp. 10-19). *Mack Steamship Co. v. Thompson*, Mich. 1910, 176 F. 499, 110 C.C.A. 57, *Knapp v. McCaffrey*, Ill. 1900, 20 S. Ct. 824, 177 U.S. 638, 44 L. Ed. 921, *The Oscada*, D.C.N.Y. 1895, 66 F. 347. The contract being maritime in nature, the District Court had jurisdiction under Section 1333 of the Judicial Code (Title 28, U.S.C.A., Sec. 1333).

This Court has jurisdiction of the appeal from the District Court under Section 1291 of the Judicial Code (Title 28, U.S.C.A., Section 1291).

STATEMENT OF THE CASE

Appellants were a joint venture, consisting of D. R. Kincaid, Ltd., a Hawaii corporation, and Thomas A. Giuli, an individual resident of Hawaii, doing business as "Kincaid-Giuli Joint Venture". They will hereafter be referred to as "Kincaid". The joint venturers were construction contractors and had under construction a loran station and related facilities, being built for the United States Coast Guard on Kure Atoll in the

North Pacific Ocean. Kure Atoll is located about 60 miles from Midway Island and Midway Island in turn is located about 1,200 miles northwest of Honolulu. Other than Midway, there are no other nearby islands which are inhabited by human beings. It is a very remote part of the Pacific Ocean. Kure Atoll, prior to the construction of the loran station, had never been inhabited. It possesses no harbor suitable for ocean-going vessels and is a typical Pacific coral atoll, with a roughly circular barrier reef, over which the surf breaks, and which encloses a shallow lagoon studded with coral heads.

In order to land sufficient construction materials and equipment on Green Island, a low, sandy islet within the lagoon, Kincaid had previously chartered other tugs and barges which had been sent, loaded with cargo, from Honolulu to the vicinity of Kure Atoll, where Kincaid was waiting with a U.S. Navy surplus World War II LCM (Landing Craft, Mechanized). An LCM is a twin diesel-powered shallow draft landing craft, capable of operating in the very shallow water of the lagoon. The LCM had met the seagoing tugs, taken over the tow of the barges, and towed them from the open sea into the shallow lagoon, and beached them on Green Island, where the loran station was located, unloading them at the beach, then returning the barges to the seagoing tug offshore, for the return to Honolulu.

At the time the contract, which is the subject of this action, was signed on March 30, 1961, Kincaid had completed the construction of the loran station, and,

being required to remove its equipment, surplus construction materials, and all extraneous material from the island (including temporary living quarters, mess hall, and electric generating units), required the services of a tug and barge to reverse the landing process. There was no regular means of travel between Kure and Midway, 60 miles away, but in a separate contract, another contractor had previously constructed an airfield on Green Island, and Kincaid, using its own light aircraft, was able to carry personnel and light cargo between Kure and Midway.

Although the contract was executed between Kincaid and Trans-Pacific Towing, Inc., Brokers, Inc., was actually the owner of part of the equipment used, and for practical purposes, the positions of the various Appellees all merge into the person of Appellee Clarence C. T. Loo, who by written agreement assumed the defense of this action and agreed to pay any judgment rendered against any of the Appellees. Thus, we will eliminate mention of the other Appellees and refer to all of them collectively as "Trans-Pacific". In general terms, Trans-Pacific agreed to cause its tug "Port of Bandon", to tow its Barge No. 30 from Honolulu to Midway, then to Kure, where Kincaid's LCM would relieve the tug of the barge, tow the barge to Green Island, load the barge, and deliver the barge back to the tug in deep water outside Kure Lagoon. The tug was then to tow both the barge and the LCM to Midway, where there is a safe, modern harbor. At Midway, the LCM was to be lifted from the water and loaded aboard the barge for the return trip to Honolulu.

Pursuant to the contract, the "Port of Bandon" left Honolulu towing Barge No. 30, and arrived at Midway on or about April 20, 1961. Tug and tow left Midway for Kure the following day, arriving off Kure at about 4:00 o'clock p.m. on the 21st day of April, where Kincaid's LCM relieved the tug of the barge and towed the barge into the lagoon to Green Island. Unlike the situation at the commencement of operations, Green Island now possessed a pier, built by Kincaid, to which the barge was moored, while it was being loaded. The tug, until the barge was loaded and towed to deep water, had nothing to do but wait. The tug, after releasing the barge, proceeded to a large mooring buoy south of Green Island, in about 60 feet of water, and moored to it. This buoy had been installed by the U.S. Coast Guard for two purposes. It was intended for use by visiting ships and it also had connected to it a submerged pipeline to Green Island, for use by oil tankers, when they replenished the Island's fuel supply. The tug remained at this buoy until the next morning, April 22, 1961, when a U.S. Navy tanker arrived and ordered the tug away from the buoy. The tug, then using its own ground tackle, anchored some distance to the northwest of the buoy. She remained there at anchor until about noon on April 24, 1961, when, while weighing anchor, struck her bottom against something, commenced leaking faster than her pumps could pump, and was beached at Green Island by her master to minimize possible loss of life, and became a total loss.

The first real issue between the parties is the question of whether the loss of the tug was due to the

negligence or incompetence of her master, or whether her loss was due to causes beyond the control of the owners or the master.

This turn of events left Kincaid with a loaded barge in Kure Lagoon with no tug to tow it to Midway and Honolulu. Kincaid demanded that Trans-Pacific find another tug to complete the voyage. Trans-Pacific, pointing to the contract, "Exhibit A", denied further responsibility for completing the voyage, and demanded that Kincaid return the barge to Honolulu.

Eventually, Kincaid chartered a Navy tug based at Midway which towed the barge to Midway, where it remained until the parties without prejudice jointly chartered a tug to tow the barge to Honolulu, and the long voyage finally ended.

Kincaid filed its Libel against Trans-Pacific on October 31, 1962, alleging essentially that Trans-Pacific failed to perform its contract of towage through the negligence of the master of the tug, which negligence was the cause of the total loss of the tug. The damages claimed by Kincaid were the cost of safeguarding the barge until it could be towed to Midway, the additional cost of chartering the Navy tug and a commercial tug to complete the voyage, and various other expenditures which Kincaid would not have incurred had the "Port of Bandon" not met with disaster. The Court below held that all of the Appellants' theories depended upon a showing that the tug "Port of Bandon" was lost through the negligence of her master, and the Court, having found that the Appellants had not shown by a preponderance of the

evidence that the negligence of the master was the cause of the tug's loss, the Court made no decision or finding as to the measure of damages to which the Appellants would have been entitled, if successful.

Thus, we see no reason for setting forth the details of the claimed damages in this appeal as they will be a matter for the trial Court to assess on remand should this Court reverse the Court below.

The second issue before this Court is whether, if the tug's loss was caused by the master's negligence, the terms of the contract excuse the Appellees from their failure to perform their towage contract. If this Court should find for the Appellants on this question, then we face the question of the measure of damages to which Appellants are entitled.

Notice of Appeal was filed in the U.S. District Court for the District of Hawaii on November 19, 1965, and the appeal perfected thereafter as the record shows by the certificate of the Clerk of the Court below.

SPECIFICATION OF ERRORS

1. The Trial Court Erred in Its Finding That Appellants did not Prove by a Preponderance of the Evidence that the Loss of the Tug "Port of Bandon" was Proximately Caused by Trans-Pacific's Negligence.

2. The Trial Court Erred in Finding That All of Appellants' Theories were Predicated Upon a Finding That Appellees were Negligent.

SUMMARY OF ARGUMENT

The Court below held that Kincaid failed to prove that Trans-Pacific's negligence was the cause of the loss of its tug. For that reason, the Court entered judgment for Trans-Pacific. If, on the other hand, the Court below *had* found that the loss of the tug was due to the negligence of Trans-Pacific, or if this Court should reverse the finding of the Court below as to the cause of the loss of the tug, then Kincaid is entitled to a decision as to whether it is therefore entitled to its damages from Trans-Pacific as a result of the latter's failure to perform its contract.

Kincaid argues that the evidence was overwhelming that the tug "Port of Bandon" was lost due to the gross and inexcusable negligence of her master, and under such circumstances there was no excuse shown for Trans-Pacific's failure to perform its contract of towage and Kincaid is entitled to damages against Trans-Pacific for its unexcused failure to perform its contract.

Kincaid's claim rests equally well on the theory that the tug of Tran-Pacific was unseaworthy, which was a breach of the contract.

ARGUMENT

1. **THE TRIAL COURT ERRED IN ITS FINDING THAT APPELLANTS DID NOT PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE LOSS OF THE TUG "PORT OF BANDON" WAS PROXIMATELY CAUSED BY TRANS-PACIFIC'S NEGLIGENCE.**

The issue in this case involves initially the question of the burden of proof of the plaintiff in a civil (or admiralty) action and what constitutes a preponderance of the evidence. This subject is a rudimentary one and, while we hereinafter cite various authorities on the subject, we are well aware that this Court needs no instruction on the meaning of the term "preponderance of the evidence".

Turning to the facts in this case, Appellants find it difficult to believe that any Court could have failed to find that the master of the tug "Port of Bandon" was negligent in the navigation and operation of his vessel, and that such negligence was the cause of the loss of the tug. We submit that it is difficult to find a single act of the tug's master which could clearly be labelled "prudent seamanship", whether related to the sinking or not.

Let us trace his conduct from the beginning of the voyage to its chaotic end. Captain Locy arrived in Honolulu in command of the "Port of Bandon", on his first voyage into tropical Pacific waters. He did not even know the length of his ship, despite having operated her in San Francisco Harbor, shifting larger ships, etc. (Tr. pp. 203-204). He had no experience in tropical coral reef areas. (Tr. p. 218, line 23, et seq.). He could not state whether he had purchased or had

aboard a U.S. Coast and Geodetic Survey Chart of Kure Atoll, although he knew he was going there. (Tr. p. 213-214). He definitely stated (Tr. p. 214) that he first went to Midway Atoll and had no charts of the Island. This is strange conduct indeed for a man venturing into unknown seas and coral reef conditions with which he had no prior experience. If he could not recall purchasing charts of the area, and had none of Midway, it can be inferred that he had no charts of Kure either, except for a vague reference to a chart which he says "Mr. Kincaid gave me". We emphasize this point because later in our argument we will elaborate on what the only charts of Kure in the record have to say about approaching Kure Atoll.

We now shift our attention to the "Port of Bandon" as it approached Kure Atoll on the afternoon of April 21, 1961. Her master had no experience with coral atolls and was not sure whether he even had an adequate chart of the Island. About 1600 (4:00 o'clock p.m.), he released the barge to Kincaid's LCM, and settled down to wait for Kincaid to redeliver the barge, loaded, to the tug. He then proceeded to moor to the U.S. Coast Guard mooring buoy and remained there until the next morning, April 22, 1961. Nothing happened to the tug or any other ship while moored to the buoy. About noon, a U.S. Navy tanker arrived and ordered the tug away from the buoy. (Tr. p. 179-180). At this point, there is some confusion as to where the "Port of Bandon" then anchored, using her own anchor and cable. Captain Locy anchored to the West and inshore from the Coast Guard buoy. He took no bearings to locate his position, and there is

conflicting evidence in the record as to just where he actually anchored the tug. Both may be inaccurate as both are based upon speculation. To this day he does not know where he anchored the "Port of Bandon", and admits it, but let us examine the record to see just what evidence there is of his position at anchor. The only evidence of the position of the tug is gleaned from a Coast Guard hearing about one month after the sinking of the tug. Captain Locy at that hearing, when asked by the examining officer, placed a mark on a chart of Kure Atoll, and the Coast Guard officer then plotted that position. Whether that was the actual anchorage of the tug will never be known, but it was Captain Locy's best belief at the time. (Tr. p. 191). The position he marked was plotted by the Coast Guard Examining Officer as 288° true from the Coast Guard mooring buoy, 1,200 yards from the buoy, and bearing 254° true from the radar reflector on Green Island. These coordinates are plotted (Appellants' Exhibit 2). It will be seen that the tug was far closer to the barrier reef than 450 yards. Yet, Captain Locy at the time of the trial stated that he was 450 yards from the barrier reef. (Tr. p. 160). We submit that the most accurate information available was the Coast Guard finding, based on Captain Locy's statements a month after the accident, as compared to his testimony in Court in March, 1964, nearly three years later. We particularly stress this discrepancy because the Court below in his decision states:

"The Court believes Captain Locy was an honest witness despite his apparently poor memory and lack of preparation for this trial.

“It is true that Captain Locy seemed to exhibit a strange lack of memory on many details, but this does not prove that he was untruthful. However unusual it might appear that he would not remember details about what he said was the worst catastrophe of his life, it is possible that he was as forgetful as he appeared to be.”

After this comment on Captain Locy's memory, the Court below accepts the Captain's three-year old memory that he was anchored 450 yards from the barrier reef on April 22, and discards the Coast Guard findings of fact which were derived from Captain Locy's own testimony a month after the accident. The Court below further discards the testimony of Will B. Smith. Smith was Kincaid's project superintendent and knew the Island. Smith observed the tug leave the Coast Guard mooring buoy, and where it anchored. (Tr. p. 17). He marked this position on Appellants' Exhibit 2. This concerned him as he felt the tug was too close to the barrier reef and on April 23, the day before the sinking, Smith, after a conference with the Coast Guard officer in command of Kure, urged Captain Locy to move from his anchorage and return to the now unoccupied Coast Guard buoy. Smith (Tr. p. 19) states:

“I said it was my opinion, shared by the Coast Guard Commander of the Island that he pull anchor and go back to the mooring buoy, or down to the slot in the lee of the Island where normally the tugboats anchor.”

Smith marked the latter position on Appellants' Exhibit 2. When Locy replied (Tr. p. 21) that the wind

was not too strong and it would be too much trouble, Smith used stronger language and said "I think you're being a damn fool. The wind changes around here, and we have had much trouble in this lagoon." Still, Captain Locy ignored the warnings.

The position and other obstructions in or near the channel or channels to be navigated, and if the peculiarities of the waters in which the towage service is to be performed involve any special hazard, it is the duty of the tug to know these things so far as by due diligence the tug might have ascertained them. In *Thompson v. Winslow* the tug master is bound to know whatever is known to persons in the habit of navigating the waters in question. *Lehigh Valley Transp. Co. v. Knickerbocker*, 212 Fed. 708. In the instant case, Smith informed Captain Locy that in his opinion Captain Locy was in a dangerous anchorage.

The Court below discards the testimony of Vern Christensen, pilot of Kincaid's aircraft, who flew over the tug daily, and who marked its position on Appellants' Exhibit 2, showing the tug as far closer to the barrier reef than 450 yards. (Tr. p. 85). His normal landing approach course took him directly over the area where the tug was anchored, and he had an excellent opportunity to observe her position. In the face of all this evidence, including the prior testimony of Captain Locy in the Coast Guard hearings, all of which indicates that the tug was far closer to the reef than 450 yards, the Court below preferred the later version of Captain Locy, the man with the poor memory, when he says he was 450 yards from the

barrier reef when he anchored the tug. There is not one scintilla of evidence which corroborates his statement.

Turning to Appellants' Exhibit 2, which Captain Locy may never have seen, we find that if he ever saw the chart of Kure Atoll, the following warning is printed prominently thereon:

"This chart should be used with care as there may be coral heads and no area has been dragged. The reefs are located principally by aerial photography and the depths of water over them are not known."

The tug master is bound to know what appears on government charts of the area. *Lehigh Valley Transp. Co. v. Knickerbocker*, supra. The Coast Pilot and the U.S. Coast and Geodetic Chart warned of the danger of coral heads.

Captain Locy's own testimony is that when he did anchor the tug, he activated his fathometer, to measure the depth of the water. He stated that the depth of water varied as the ship swung at anchor, and if he recalls correctly, the least sounding he got was 50 feet (Tr. p. 160). The bottom did not appear to be flat but had "peak spots-highspots all over". (Tr. p. 182). This statement, of course, indicates the very uneven contour of the sea bottom, and was precisely the danger which Appellants' Exhibit 2 warned of.

The "Coast Pilot", an official U.S. Government Publication, which is a guide to mariners, recommended other anchorages, which Captain Locy disre-

garded, perhaps because he did not even consult the publication or have it aboard. (Tr. p. 104).

At this point, it is submitted that the tug was, from the moment she dropped anchor, in a very perilous and dangerous anchorage, and from the outset, in danger of striking an uncharted coral pinnacle. Her master failed to return to the Coast Guard mooring buoy, failed to heed all warnings, and remained at this anchorage. It is submitted that Appellants had up to this point in the evidence, clearly made a prima facie case of negligence against the master of the tug as no evidence has been offered in rebuttal.

The conduct of Captain Locy, however, was to become even more negligent early on the morning of April 24, 1961, when the wind shifted from north to east. (Tr. p. 185). This caused the ship to swing around so that instead of the bow of the tug being to the barrier reef, the stern was toward the reef. (Tr. p. 64). It is obvious that the tug was now closer to the barrier reef than before, and the wind was now blowing *toward* the reef, rather than away from it.

There was considerable testimony on cross-examination of Captain Locy on the effect of a change of wind direction on the position of an anchored vessel. Although certain other factors, such as current and wave action can affect the action of a ship, an anchored vessel will generally lie to leeward of her anchor. (Tr. p. 200). Thus, we submit, the tug with a length of at least 80 feet anchored in 60 feet of water with 400 feet of anchor cable, would normally actually be to leeward of her anchor at a distance approaching 480

feet, more or less, or about 160 yards to leeward of her anchor. To carry the mathematics of this reasoning further, if the wind shifted so that it was blowing toward the barrier reef rather than away from it, the tug, as it swung around in an 180° arc, could actually take a new position as much as 300 yards *closer* to the barrier reef than before the wind changed, even though the anchor did not change position. We submit that by Captain Locy's own testimony, this is precisely what happened when the wind shifted early on the morning of April 24, 1961. If his position was dangerous enough the day before for Mr. Smith to urge him to leave the anchorage, it was now vastly more so as he was far closer to the barrier reef in an area of uncharted coral pinnacles.

Although the cases cited generally involve damage to the tow, we feel that it is appropriate to cite certain cases involving the lack of diligence of the tug master in failing to take proper action upon a change of the weather. They normally arise where during the voyage the weather changes and the tug fails to take prompt action to remove the tow to a safer place. In the event of the tug's failure upon a change of wind and sea conditions to take proper action, the tug's owners have been held liable for the damage sustained. *Bouchard Transportation Co. v. Pennsylvania R. Co.*, 6 F. 2d 362. In the instant case, Captain Locy knew or should have known that when the winds shifted, his danger greatly increased. See *The Sea King*, 14 F. 2d 684; *Nicholson v. Erie R. Co.*, 255 Fed. 54; *Boutin v. Rudd*, 82 Fed. 685.

Two expert witnesses, Captain Howard Jones and Captain Chester Jackson, both master mariners of great experience, testified that whatever else Captain Locy should have done, he should have left his anchorage immediately when the wind shifted, early on the morning of April 24, 1961 (Tr. p. 114-253), and that it was not an exercise of prudent seamanship to remain at his anchorage after the wind shifted. This testimony is un rebutted by any opinion evidence. Captain Locy remained so anchored until about noon on the 24th, and by noon the wind and sea had increased to the point where the tug was rolling heavily and he felt that the tug might be dragging anchor, and he decided to get underway and head to sea. In the process, of raising the anchor, the tug hit something hard and began to leak. Captain Locy himself, when asked, stated that he believes his tug struck a coral reef (Tr. p. 219). No other explanation has been offered. It is undisputed that the tug began to leak uncontrollably after striking whatever it struck and Captain Locy ran the ship aground to save the crew, and the tug became a total loss.

These are the events upon which Appellants based their argument that the loss of the tug "Port of Bandon" was proximately due to the negligence of its master. No evidence to the contrary was offered by the Appellees and it is submitted that Appellants have shown not only by a preponderance of the evidence, *but beyond any reasonable doubt* that Captain Locy ignored all warnings and negligently moored his ship in an unsafe anchorage, suffered it to remain in such

anchorage until the inevitable happened despite being urged to move and despite a change in wind and sea, and the tug struck a coral pinnacle and was lost. There is no other realistic possibility.

Before turning to a review of the authorities, we feel it might be helpful to examine the decision of the Court below and to point out certain obvious discrepancies between the evidence and the decision. The Court below states that the tug anchored on April 22, 1961, about 1,200 yards west of the buoy and approximately 450 yards south of the barrier reef. The depth of the water there was between 60 and 65 feet. (Dec. p. 2, lines 30 et seq.) The testimony of Captain Locy is that the depth of the water where he lay anchored at that time was between a "high" of 50 feet and 60 feet (Tr. p. 160). The decision further states immediately thereafter:

"The tug was on the lee side of the island, protected from the wind, until about noon on April 24, 1961, when the wind got stronger and shifted . . ." Dec. p. 3, lines 1, 2 and 3.

The clear testimony of Captain Locy is to the effect that:

"Around daylight, or after daylight, the wind shifted to an east—coming out of the east, it began picking up, increasing in velocity to somewhere in the neighborhood of thirty miles per hour. As the morning wore on the seas gradually began to come from the same direction. The wind was carrying them in I assume, from the offshore blow. There was more sea and swell than the wind would normally create." (Tr. p. 164).

We particularly emphasize this point, because both of Appellants' experts stated that for Captain Locy to remain in his anchorage *after* the wind shifted would not be prudent. The Court below seems to have forgotten that the wind shifted and increased at daylight, not at noon, and the tug remained in its anchorage for about six hours after the change in conditions. Perhaps, this is why the Court below appeared to attach no significance to the opinions of two master mariners.

The Court was concerned that it would be difficult to locate a ship as small as the tug on the scale of the maps in evidence. (Dec. p. 3, lines 25-29). This may have presented a problem to the trial Court, but it is undisputed that the map to which the Court refers was Appellants' Exhibit 2, which is the official Coast and Geodetic Survey Chart No. 4177, published by the U.S. Government for the guidance of mariners, and certainly the two experts called by Appellants had no problem with the scale of the chart.

The trial Court (Dec. p. 4, lines 21-25) stated that there was no reliable or persuasive evidence that the tug dragged its anchor. With this observation we cannot argue, but point out that when the wind shifted the tug inevitably found itself in shallower water, as the evidence is clear that after the wind shifted the tug was between the anchor and the reef, rather than to seaward from the anchor, and the chart clearly indicates a sloping bottom, becoming shallower as the distance to the reef decreased. The Court then states that there is:

“... no reliable evidence that it (the tug) actually hit the reef; in fact no clear evidence that it even hit a coral head, *although that seems to be a strong probability.*” Dec. p. 4, lines 23-25. (Emphasis supplied).

We do not wish to unduly labor the point, but submit that the evidence is *overwhelming* that the tug struck the coral, and even the Court felt it to be strongly probable, yet says there is no persuasive evidence as to the fact. Preponderance of evidence means that evidence which is most consistent with the truth as measured by the experience and judgment of the jury; that which accords best with reason and probability. *U. S. v. McCaskill*, 200 F. 332. Preponderance of the evidence is a phrase which in its last analysis means probability of its truth. *Boyd v. Gosser*, 82 So. 758. The preponderance or greater weight of evidence does not merely mean the greater number of witnesses, but means that evidence which, when weighed with that opposed to it, has the most convincing force, and from which it results that the greater probability is in favor of the party presenting it. *Kenney v. Henson*, 107 S.W. 2d 947. We repeat that there is *no* evidence in the record which would otherwise explain what the tug struck, and caused it to sink, other than a coral pinnacle. The Court below (Dec. p. 5, line 20 et seq.) seems to be confused as to what Appellants were attempting to prove, namely that Captain Locy negligently and in the face of many warnings, anchored his vessel too close to shallow water for safety and when the wind shifted, his ship swung around even closer to

the reef and ultimately struck the bottom, sinking as a result. He forgets that a coral reef is made of coral and coral heads and if his ship struck the bottom of the ocean, the water was obviously not deep enough to float it. Lastly, the Court says (Dec. p. 6, lines 1-3) that there is no evidence that anyone knew, or advised the Captain, that there was any special danger from coral heads that could put a hole in the tug in the area where he anchored. The trial Court forgets the U.S. Coast and Geodetic Survey, which published a chart (Appellants' Exhibit 2) for people like Captain Locy, warning him against the very peril which destroyed his ship, and recommending other anchorages, the warning of Will B. Smith, who told him he was in a dangerous anchorage and was a "damn fool" if he did not leave the area, and the U.S. Coast Pilot, which recommended other anchorages.

We find no authorities defining negligence any differently in maritime law than in other situations. It is a word which has been defined by the Court with exceeding frequency and as stated in 65 C.J.S. 304, Section 1a(2), Negligence:

"Of the numerous definitions of 'negligence', among the best has been declared to be the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."

In *San Francisco Bridge Co. v. The Charles Nelson Co.*, 10 Cal. App. 2d 685, the master of a steamer which was towing a barge noticed that the barge was taking on water. He and his crew were found to be

negligent when the barge sunk as they could have pumped the water from the barge. Where a tug caused its tow to strand through want of accurate knowledge of the channel on the part of the master, the Court found that such want of knowledge amounted to negligence. It further stated that if the locality is more than ordinarily dangerous, she (the tug) is held to a proportionately higher degree of care and skill. *The Somers N. Smith*, 120 Fed. 569. In *The Havana*, 45 Fed. Supp. 244, the master of a vessel was held to be negligent in failing to obtain necessary data to enable him to properly navigate his vessel, which stranded through that negligence.

It is submitted that there can be no other realistic conclusion than that the master of the tug was negligent in the management and operation of his vessel, and that the proximate cause of the loss of the tug was such negligence.

The next logical step we must take is to ask whether the inability of the Appellees to complete the voyage due to loss of the tug excused the Appellees from any duty to perform, if this inability was due to negligence. In most of the cited cases, the tow was damaged due to the negligence of the tug, but in all of the cases we will cite, the principle was applied that loss or damage suffered by the owners of the tow resulting from the negligence of the tug was to be borne by the owners of the tug, despite any contractual provisions to the contrary.

If in fact the "Port of Bandon" was lost through the negligence of her master, then without discussing

the measure of damages we believe it is appropriate to discuss whether or not the loss of the tug under such circumstances excuses Trans-Pacific from performance of the contract. Clearly, a reading of the agreement of the parties shows that it was the intent of the parties that Appellees were obligated to proceed with the "Port of Bandon", towing Barge No. 30 from Honolulu to Kure and return. There is no question that there was no such performance as the tug was a total loss at Kure. Thus, the tug did not perform and we must only look to whether any excuses for non-performance exist. Trans-Pacific relies on the terms of paragraph 13 of the contract. Stripped of language unimportant to this issue we quote as follows:

"... neither Trans-Pacific nor the vessels shall be responsible for loss or damage sustained by Kincaid due to the *failure or refusal* of Trans-Pacific to perform or complete the performance of any transportation service herein provided for, if arising or resulting from loss of . . . the vessels or either of them, or resulting . . . from any *other* cause beyond the control of Trans-Pacific." (Emphasis supplied.)

To us this language means that if the Appellees failed or refused to perform the contract for reasons within their control, then they would be liable for damages due to such non-performance. If Appellees had obtained a more lucrative charter and had deliberately refused to perform or if Captain Locy had deliberately scuttled the ship to collect on the ship's insurance policy, then the failure to perform would have been due to causes within the control of Appellees.

If, on the other hand, an unprecedented storm had caused the loss of the tug and/or barge, or if the tug had been struck by lightning and lost, then *perhaps* under the terms of the contract no further duty to perform would have existed. In this situation we submit that the tug was lost as a direct result of the negligence of her master and that this loss was not due to causes beyond his control. We ask whether the language of the contract meant that it was possible for Trans-Pacific to lose the tug through its own negligence and escape from liability for non-performance, but remain liable for other failures to perform if the causes were within their control. In other words, was the loss of the tug a special type of loss in a special class by itself such that its negligent loss excused Trans-Pacific from a duty to perform?

We say it was not. We say that it was excused from further performance only for reasons which were beyond its control and that the loss of the tug excused Trans-Pacific only if such loss could not have been avoided by proper diligence. Trans-Pacific doggedly takes the position that even its own negligence excused it from any further duty to perform, basing its argument on an unreasonable construction of paragraph 13 of the contract.

Kincaid has a different and second argument saying that even if the Court should construe paragraph 13 of the contract to mean that the negligent loss of the tug or barge would excuse Trans-Pacific from any further obligations under the contract, such a contract is null and void and against public policy. See *San*

Francisco Bridge Co. v. The Charles Nelson Co., 10 Cal. App. 2d 685, wherein defendant by oral agreement agreed that its steamer would tow plaintiff's Barge No. 30 from San Pedro to San Francisco. This agreement was reduced to writing confirming in letter form the oral agreement. The pertinent provision of the contract read as follows:

“The tow service is to be entirely at the risk of the tow and the steamer ‘Griffdu’ and her owners take no responsibility whatsoever for the safe towage of said tow, and agree solely and only to furnish the motor power.”

The tow commenced and during the voyage, the barge commenced to take on water due to increasingly rough seas and sank lower into the water. This condition became apparent to the master of the steamer, but he took no corrective action, although he could have put men aboard the barge to pump her out. The barge had been equipped with adequate pumps for the voyage. The barge flooded and was lost.

The Court held for the owners of the barge against the owners of the steamer, finding that the barge had been lost as a result of the negligence of the master and crew of the steamer.

When the steamer's owners asserted that by the terms of the towing agreement they were not responsible for loss of the tow, the court stated at page 691:

“... when defendants sought to so limit their responsibility that they would not be liable for their own negligence, they incorporated a provision in the instrument which was opposed to public policy and therefore illegal and void.”

See also *The Somers N. Smith*, 120 Fed. 569, where, after it was established that the tug negligently caused its tow to be stranded on a reef, the court held that the burden rests upon a tug to prove an alleged contract that a vessel was to be towed at the risk of her owners, nor will such a contract, if proved, relieve the tug from liability for the consequences of a failure of those in charge to exercise reasonable care and skill in the performance of the service. See also *In re Moran*, 120 Fed. 556; *The Syracuse*, 79 U.S. 167, 171, 20 L. Ed. 382; *Deems v. Canal Line*, 7 Fed. Cas. 348; *Vanderslice v. The Superior*, 26 Fed. Cas. 970; *Williams v. The Vim*, 29 Fed. Cas. 1413; *The Jonty Jenks*, 54 Fed. 1021; *The Adelia*, 1 Hask. 505, Fed. Case No. 79; *The Webb*, 14 Wall. 414, 20 L. Ed. 774; *The Deer*, 4 Ben. 352, Fed. 3737; *The Hercules*, 81 Fed. 218; *The M. J. Cummings*, 18 Fed. 178. We could cite innumerable additional cases for the same proposition, namely, that a tug is responsible in damages for its failure to perform a contract of towage, if the failure is the result of the tug's negligence, regardless of the terms of the towage contract. See also *The Margaret*, 94 U.S. 494; *Bisso v. Waterways Transport Co.*, 235 F. 2d 741.

Paragraph 13 is too ambiguous to be construed a clause which would exculpate the Appellees for damages suffered by Appellants.

"It is the settled rule that exceptions in a charter party inserted, by the shipowner for his benefit, are unquestionably to be construed strongly against him." (*Gillmore & Black*, p. 176.)

Paragraph 13 should not be construed to limit the shipowner's liability because nowhere does it state that the shipowner would *not* be responsible for his "negligence" or the "negligence" or "gross negligence" of the master or crew.

Paragraphs 11 and 12 upon which Trans-Pacific so heavily relies specifically use the word "negligence" and paragraph 13 does not mention "negligence", indicating that the parties did not intend that shipowner be exculpated from liability for the negligence or gross negligence of the master or crew.

The following cases show that paragraph 13, if it is meant to exculpate the Appellees for the gross negligence of the captain and crew, cannot be so used because of its ambiguity.

In the *New Jersey Steam Nav. Co. v. Merchants' Bank*, 12 L. Ed. 465, 482, 47 U.S. 344, 383 (1848), the shipper assumed "all risk" of property transported by him but the exception did not state that the shipper would assume the risks which resulted from the negligence of the captain, crew or carrier, the court stated:

"The burden of proof lies on the carrier, and nothing short of an expressed stipulation by parol evidence or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful or conflicting evidence; but should be specific and certain, leaving no room for controversy between the parties.

"The special agreement, in this case, under which the goods were shipped, provided that they

should be conveyed at the risk of Harnden; and that the respondents were not to be accountable to him or his employers, in any event, for loss or damage.

“The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going farther than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, and her management by the master and hands.”

In the *Syracuse v. Langley*, 79 U.S. 167, 171 (1870), the captain of steamer towing a canal boat under a private charter was negligent and the owner was liable even though the barge was being towed at her own risk but not mentioning “negligence”. The court stated:

“It is unnecessary to consider the evidence relating to the alleged contract of towage because if it is true, as the appellant says, that by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, the disaster occurs, the towing boat must be visited with the consequences.”

The case of *Compania de Navigacion La Flecha v. Brauer*, 168 U.S. 104, 118, 18 S. Ct. 12, 15 (1897), the facts involved a contract for the carriage of cattle on the deck of a steamer *at the owners' own risk*; steamer not to be held accountable for accident to or mortality of the animals, from whatever cause arising. A libel against the shipowner was brought for the loss of the cattle, which, during a storm at sea, had been unnecessarily driven overboard by the crew. The court stated:

“An exception, in a bill of lading, of perils of the sea, or other specified perils, does not . . . exempt him from liability for loss or damage from one of those perils to which the negligence of himself or his servants contributed.”

On page 17, 18 S. Ct. and on page 123, the court stated:

“The clauses of the bill of lading (other than the reference to British law) or which the respondent relies are those in the first paragraph, ‘on deck at owner’s risk (shipper); steamer not to be held accountable for accident to or mortality of the animals, from whatever cause arising;’ and those in the third paragraph, by which ‘it is mutually agreed that the carrier shall not be liable for loss or damage occasioned by causes beyond his control by the perils of the sea, or other waters’ by barratry of the master or crew; or collisions, standing, or other accidents of navigation, of whatever kind, even when occasioned by the negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the shipowner.

“The bill of lading itself shows that all the cattle to be carried under this contract were to be on deck. The words ‘on deck at owner’s risk’ cannot have been intended by the parties to cover risks from all causes whatsoever, including negligent or willful acts of the master and crew. To give so broad an interpretation to the words of exception inserted by the carrier, and for his benefit, would be contrary to the settled rules of construction, and would render nugatory many of the subsequent stipulations of the bill of lading.”

In order to show these three Supreme Court cases are still applicable attention is called to Justice Frankfurter’s discussion of the cases in his dissent in *Bisso v. Interland Waterways Corporation* (1955), 349 U.S. 85, 105, 75 S. Ct. 629, 640, a case in which the majority struck down an exculpatory clause in a towage contract (not a private charter):

“In the leading case of *New Jersey Steam Navigation Co. v. Merchants’ Bank* (of Boston), 6 How. 344 (12 L. Ed. 465) . . . (the court stated) ‘But we think it would be going further than the intent of the parties . . . were we to regard it as stipulating for . . . want of ordinary care . . . If it is competent at all for the carrier to stipulate . . . it should be required to be done at least in terms that would leave no doubt as to the meaning of the parties’, 6 How. 383, 384 (12 L. Ed. 465). See, also . . . *The Steamer Syracuse*, 12 Wall. 167 (20 L. Ed. 382) 168 U.S. (Brauer case), at pages 118-120, 18 S. Ct. at page 15.

“This citation in the *Steamer Syracuse* as an example of instances in which a rule of narrow

construction of exculpatory clauses had been invoked should have set to rest any misunderstanding concerning the scope of its ruling."

Kincaid contends that the only thing clear about the exculpatory clauses in its contract with Trans-Pacific is that it is not clear if there is one exculpatory clause applicable to this situation—or three of them.

Kincaid further contends that it would be a gross understatement to say that the clauses in this contract with Trans-Pacific are not as clear as those called void by the Supreme Court of the United States in the above mentioned cases.

THE TRIAL COURT ERRED IN FINDING THAT ALL OF APPELLANTS' THEORIES WERE PREDICATED UPON A FINDING THAT APPELLEES WERE NEGLIGENT.

Impossibility is not an excuse for non-performance. Appellees state they are excused from performance because of impossibility of performance since their tug sank.

Appellants say you are not excused because:

"It is clear that for supervening impossibility of performance to operate as a defense available to the contractual promisor, it must be fortuitous on his part. Thus it is stated by Corbin on Contracts, Section 1329 that 'whatever be the meaning given to the term impossibility of, whether it be objective or subjective, and even though it be used to include varying degrees of difficulty and expense, the supervening situation that is so described does not excuse a promisor from his con-

tractual duty if he himself wilfully brought it about, or if he could have foreseen and avoided it by the exercise of reasonable diligence and efficiency.' " 84 A.L.R. 2d 12, 62.

Also see *Fujikawa v. Sunrise Soda Works Co.* (1946, C.A. 9 Hawaii), 158 F. 2d 490, which follows the above philosophy.

The impossibility of performance argument has been used in the Admiralty Court. *The Richland Queen* (1918, C.A. 2 N.Y.), 254 F. 668, and cited in 84 A.L.R. 2d 108.

Kineaid contends that Trans-Pacific should not be excused for its failure to perform under contract for the reason of "impossibility" because the impossibility was caused by his negligence in sending out an inexperienced captain and crew in strange waters with no charts.

"There is no evidence in the record that the owners of the tugs, either the record owners or the owners hoc vice, had made any particular inquiries as to his competency. The petitioners seem to think it is sufficient to maintain their case that the owner or owners had no knowledge or reason to believe that the master was not competent; but this form of statement is not sufficient, because it does not comply with the statute which requires 'due diligence'.

"In our prior opinion, in determining that the loss occurred through the fault of the master of the tug, we said as follows:

"It appears that the captain of the tug neither looked to see whether the tow was straightened

out on its course, nor received any information from the lookout in that respect, after passing the red buoy.

“This red buoy, we will note was at a critical point in the navigation of the river. An omission so gross as this raises so strong a presumption of fact that the master was not competent as practically to throw the burden to the petitioners to establish the proposition that they used due diligence with reference to his selection, whether the statute does or does not impose such a burden. Yet the other facts which appear in the record, so far as meeting this presumption strengthen it. We are therefore not satisfied that whoever controlled the tug used the due diligence which the statute required in the selection of this master, necessary to justify us in relieving her from liability for this loss which the common law imposed as the result of gross negligence at the critical time.”
The Cygnet, 126 Fed. 742 (1st Cir. 1903).

“In construing in a bill of lading the exceptions to the shipper’s liability, the rule is to be remembered that where the words leave the intention in doubt they are to be construed against the person for whose benefit they have been introduced. Their meaning is not to be extended to give him a protection for which he has not bargained in clear terms.

“Thus, it is presumed, unless stated to the contrary, that the shipowner is to continue liable for negligent acts and defaults, committed by himself, or by his servants or agents engaged in performing the contract. General words, therefore excepting losses from a particular cause, do not protect him if that cause came into operation through

such neglects or defaults." *Carver Carriage by Sea* (English), Fourth Edition, p. 95.

"The courts should be vigilant to see that the extension by analogy of the principle of general average does not encroach upon the equally valid and much more important principle that the shipowner is under a duty to employ whatever means are needful to fulfill *his contract of carriage*, even though difficulties of various sorts may result in its costing him a little more than he hoped." *Gillmore & Black*, p. 238.

Appellees' contention that the Carriage of Goods by Sea Act, 46 U.S.C.A. 1312 and the Harter Act, Vessel Owner's Liability, Limitation, 46 U.S.C.A., Section 190, 191, 192 may be applicable and Appellants welcome the applicability of the above acts.

A. General principles concerning the applicability of the Harter Act, and Cogsca (Carriage of Goods by Sea Act) are:

"It has been felt, apparently that the bargaining power of charterers and owners is equal enough that they may be left to contract freely, a situation in sharp contrast to the great disparity between ship lines and the shippers of package cargo. Nonetheless, it is a settled rule that 'exceptions in a charter party, inserted by the shipowner for his own benefit, are unquestionably to be construed strongly against him.'" *Gillmore & Black*, p. 176.

Neither Cogsca nor the Harter Act apply to cases of private charter but:

"As a matter of practice, many charter party forms stipulate for the applicability of Cogsca or

the Harter Act to the charter—owner relations; such a stipulation is of course valid, *and prevails even where no bill of lading is issued.*" *Gillmore & Black*, p. 175.

We agree with Appellees that the Harter Act applies because paragraph 15 of the contract reads as follows:

"15. Trans-Pacific shall have all rights to limitation of and exemption from liability as are granted by federal statutes to owners and charters of vessels, and nothing herein contained shall constitute a waiver thereof."

Both the Harter Act and Cogsa deal with limitations of shipowners from liability. The Harter Act is in the "Limitation of Liability" chapter of the Code.

Why Cogsa is not applicable and the Harbor Act is:

46 U.S.C.A. 1312, Carriage of Goods by Sea Act reads:

"... Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions."

"Carriage of Goods by Sea Act expressly relates to 'foreign trade' which is the transportation of goods between ports of the United States and foreign ports." *The Vale Royal*, 51 F. Supp. 412 (Dist. Ct. Maryland 1943).

While it is true the Carriage of Goods by Sea Act may be adopted in cases of domestic trade by express

agreement, in which case provisions of the Harter Act are superseded. *The Vale Royal*, supra.

The private charter involved here is one between ports of the United States or its possessions. Honolulu, Kure and Midway. Since there are no expressed words indicating Cogsa is to apply the Harter Act if either is applicable.

The Harter Act is now contained in three sections of the U.S.C.A. and reads as follows: Sections 190, 191 and 192, which read as follows:

“It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading on shipping receipts shall be null and void and of no effect. Feb. 13, 1893, c. 105, Sections 1, 27 Stat. 445.”

“It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said

vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. Feb. 13, 1893, c. 105, Sections 2, 27 Stat. 445."

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. Feb. 13, 1893, c. 105, Sections 3, 27 Stat. 445."

Effect of Harter Act on this case if the Court finds it applicable.

1) All limitations of liability in the contract other than those contained in the Harter Act would be void.

The Ninth Circuit (1962) in *Isthmian Steamship Co. v. California Spray-Chem. Corp.*, 300 F. 2d 41, 45,

47, stated this with regard to the Harter Act when other exculpatory clauses are in the contract:

“But the Harter Act must be interpreted in light of the common law as it was, unmodified by the agreements which it permitted. As we have seen, the very purpose of the Harter Act was to prevent the carrier from avoiding its common law responsibilities by the device of recurring ‘agreements’ which included exculpatory clauses.” P. 45.

“The presence of this standardized clause in the contract does not represent an agreement between appellant and the shipper. It is simply a condition unilaterally imposed by the carrier upon the shipper; in the words of some scholars, it is an ‘adhesion contract’, viz. a contract ‘in which one party’s participation consists of his mere adherence’ (Ehrenzweig, *Adhesion Contracts in Conflicts of Laws*, 53 *Colum. L. Rev.* 1072, 1075; see also Dressler, *Contracts of Adhesion*, 43 *Colum. L. Rev.* 629). We have already seen that the Harter Act was adopted to prevent the use of just such false agreements which make ‘freedom of contract’ an illusion.” P. 47.

2) In order to escape liability the Appellees would have to show the ship to be seaworthy and properly manned, points in which they have put on little or no evidence to controvert testimony in favor of Appellants which proved:

a. that there were no charts furnished to the captain of the tug by the owners; who was on his first voyage in tropical waters;

b. the owners should have known the captain was incompetent;

c. the owner did not use due diligence in manning or equipping the ship or making it seaworthy.

“Most important, it is to be noted that the warranty of seaworthiness, implied by law in every chapter.” *Gillmore & Black*, p. 204.

“In the famous case of the *Isis* (290 U.S. 333, 54 S. Ct. 162 (1933)), the Supreme Court read Section 3 of Harter literally, and held that the condition had to be met before immunity could be availed of, whether or not the actual loss or damage was causally connected in any way with the unseaworthiness defect left uncorrected through a failure of due diligence. Thus, under the *Isis* rule, a ship, on a voyage subject to the Harter Act, may sail with inadequate or antiquated charts, thereby increasing the risk of her coming to grief in dangerous waters through which she is to pass in the course of the voyage. Before reaching these waters, or even after successfully negotiating them, she may negligently collide with another vessel, damaging herself and her cargo.” *Gillmore & Black*, p. 129.

This decision indicates that due diligence must be proved as a condition precedent, under penalty of losing the benefit of the exemption, and failure of proof was fatal.

See *The Cygnet*, 126 Fed. 742, quoted in detail earlier in this memorandum.

Burden of proof to show vessel properly manned is on owner and if one employs a seaman who cannot understand orders, boat not seaworthy or properly manned. *The Nordpol*, 84 F. 2d 3 (2d Cir. 1936).

To secure contribution toward his own expenses and sacrifices in connection with casualty resulting from negligence of vessel owner's employees under contractual provisions, vessel owner has burden to establish that vessel was in all respects seaworthy, properly manned, equipped and supplied, or that he exercised due diligence to make her so. *The Maria*, (D.C. S.D.N.Y. 1936), 15 F.S. 745.

The burden of proof is upon the carrier or owner to show that the vessel was seaworthy. *International Nav. Co. v. Farr. & Baily Mfg. Co.*, 181 U.S. 218, 22 S. Ct. 591.

A ship not manned by a competent crew is unseaworthy. *Peninsular & Occidental S.S. Co. v. National Labor Relations Board*, C.C.A. 5, 98, F. 2d 411, 414.

Tugboat unseaworthy because of deckhand's lack of qualification and competence. *Moran v. U.S.D.C. Mass.*, 82 F. Supp. 525, 526.

Where there is any doubt as to the unseaworthiness of the vessel, that doubt must be resolved against shipowner, in determining liability for cargo damage. *The Vizcaya* (D.C. Ed. Penn. 1945), 63 F. Supp. 898.

Since the Appellees inserted paragraph 15 into the contract—"it is the settled rule exceptions in a charter party, inserted by the shipowner for his benefit are unquestionably to be construed strongly against him." *Gillmore & Black*, p. 176.

Although this brief is lengthy and perhaps discretion should dictate against a repetition of assertions made earlier, we would like to remind the Court

that if Captain Locy was incompetent, then the vessel was unseaworthy based upon the foregoing authorities. His actions or omissions, as the case may be, are more fully set forth earlier, including but not limited to:

- 1) His inability to remember whether he had charts of the Kure area;
- 2) The fact that this was his first voyage into tropical coral filled waters;
- 3) The obvious warnings printed on his official Coast and Geodetic Charts, which if he in fact possessed them disregarded;
- 4) His failure to anchor at the recommended anchorage shown on the chart and his mooring of his vessel far inshore from such position;
- 5) His failure to utilize the Coast Guard mooring buoy after the Navy tanker departed;
- 6) His failure to heed the warnings transmitted to him by radio from shore that he was too close to the reef;
- 7) His failure to take cross-bearings to determine whether he was dragging anchor;
- 8) His failure to get underway early on the morning of the accident when the wind shifted destroying his lee;
- 9) His failure to remember even the length of his ship despite the fact he had operated her for many years;

10) The owners' failure to present any evidence whatsoever of exercise of due diligence;

11) His failure to consult the Coast Pilot for the area.

We submit that the master of the "Port of Bandon" was simply out of his element, in unfamiliar conditions and made no effort to obtain such information as was available or to seek or heed the opinions and advice of any person. All of these factors made the vessel unseaworthy and doomed her as surely as if her bottom planking had fallen off due to neglect.

CONCLUSION

Under any of the theories available to the Court the decision and judgment of the Court below should be reversed and the cause remanded with directions to determine the measure of damages to which Appellants are entitled.

Dated, Honolulu, Hawaii,

March 4, 1966.

Respectfully submitted,

HODDICK, ROTHWELL & CHANG,

By ROBERT M. ROTHWELL,

Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals, for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT M. ROTHWELL,
Attorney for Appellants.

(Appendix Follows)

Appendix.

Appendix of Exhibits

| Exhibits of Record on Appeal | Transcript Reference |
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| Appellants' Exhibit No. 1 (Copy of Contract dated March 30, 1961 (In evidence) | Tr. p. 86 |
| Appellants' Exhibit No. 2 (Coast and Geodetic Survey Chart No. 4177 of Kure Atoll) (In evidence) | Tr. p. 86 |
| Appellees' Exhibit "G" (U. S. Coast Guard Investigating Officer's Report of the Sinking of the Tug "Port of Bandon", dated May 29, 1961) (In evidence) | Tr. p. 153 |
| Appellees' Exhibit "H" (Coast and Geodetic Survey Chart No. 4177 of Kure Atoll) (In evidence) | Tr. p. 175 |

No. 20,737

IN THE

United States Court of Appeals
For the Ninth Circuit

D. R. KINCAID, LTD., and THOMAS A.
GIULI, doing business as Kincaid-
Giuli Joint Venture,

Appellants,

vs.

TRANS-PACIFIC TOWING, INC., BROKERS,
INC., and CLARENCE C. T. LOO,

Appellees.

Appeal from the District Court of the United States
for the District of Hawaii

Honorable C. Nils Tavares, Judge

BRIEF OF APPELLEE

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VS.

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INC., and CLARENCE C. T. LOO,

Appellees.

Appeal from the District Court of the United States
for the District of Hawaii

Honorable C. Nils Tavares, Judge

BRIEF OF APPELLEE

JURISDICTION

This is an appeal from a final decree in admiralty of the United States District Court for the District of Hawaii, which decree was filed on October 21, 1965. (Record, pp. 130-132.)

The United States District Court for the District of Hawaii had jurisdiction over the parties, as Appellants were a joint venture consisting of an Hawaiian

corporation and an individual resident of the State of Hawaii, and the principal Appellee was an individual resident of the State of Hawaii. (Record, pp. 3-4.) The subject matter of the libel was a contract of towage (Record, pp. 10-19) which is maritime in nature. *Mack Steamship Co. v. Thompson* (Mich. 1910), 176 F. 499, 110 C.C.A. 57; *Knapp v. McCaffrey*, 177 U.S. 638, 44 L.ed. 921 (1900); *The Oscada*, 66 F. 347 (D.C.N.Y. 1895). The contract, being maritime in nature, the District Court for the District of Hawaii had jurisdiction of the libel. 28 U.S.C. 1333.

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal. 28 U.S.C. 1291.

STATEMENT OF THE CASE

The Libellants, hereinafter referred to as "Appellants", entered into a contract with Trans-Pacific Towing, Inc., hereinafter called "Appellee", dated March 30, 1961. (Libellants' Ex. 1.) By this contract Appellee agreed to tow its Barge No. 30 with its tug "Port of Bandon" from Honolulu to Midway and Kure atolls where Appellants' cargo would be loaded upon the barge after which Appellee would tow the barge to Honolulu via Midway. The fee for the voyage from Honolulu to Kure, Midway and return to Honolulu is set forth in paragraph 2 of said contract to be the sum of \$19,722.00 to be earned on the departure of the tug from Honolulu for Kure. Paragraph 19 of the contract provided that prior to the departure of

the tug and barge from Honolulu for Kure and Midway, Appellants would deposit the charge for the voyage in the amount of \$19,722.00 with Henshaw, Conroy & Hamilton and that upon arrival of the tug at Kure or upon the occurrence of any event excusing Appellee from performing or completing the transportation service to Kure and Midway, pursuant to paragraph 13 of the contract, Henshaw, Conroy & Hamilton shall pay the \$19,722.00 to Appellee. By paragraph 6 of said contract, Appellants agreed that Kure would be a safe moorage or port for the barge. It was further agreed that Appellants would make all arrangements for the safe mooring of the barge at a dock, wharf or place at Kure so that the barge would safely lie afloat at all times of the tide, except that Appellants might at their risk beach the barge to facilitate loading operations but any damage caused by such beaching was to be repaired by Appellants at their expense.

Paragraph 11 of the contract provided that Appellants would insure the cargo in their names and in the name of Appellee against "all risks", including the payment of general average, salvage and special charges for the full value of the cargo. Paragraph 11 further provided that if Appellants failed to obtain the required insurance and Appellee commenced the voyage, then Appellants would have no claim against Appellee for any loss or damage even though the loss or damage was contributed to by the negligence of Appellee and furthermore, Appellants agreed to indemnify and save Appellee harmless from any claim

on account of such loss or damage. Appellants failed to obtain the insurance required by the contract.

Paragraph 12 of the contract further provided that neither Appellee nor the vessel shall be liable for any loss or damage occasioned to the cargo or the LCM arising or resulting from any cause whatsoever and whether or not due to negligence of Appellee, its officers, agents or employees, it being the intention of the agreement that Appellants would look solely to the insurance which it agreed to secure for the payment of any loss or damage to the cargo.

Paragraph 13 of the contract provided that neither Appellee nor the vessel would be responsible for loss or damage sustained by Appellants due to the failure or refusal of Appellee to perform or complete the performance of any transportation service provided for in the contract if the vessels or either of them was lost.

Pursuant to the contract, the tug "Port of Bandon" and Barge 30 departed Honolulu on April 8, 1961 and arrived at Midway at 0500, April 20, 1961, departed Midway for Kure at 0730, April 21, 1961, and arrived at Kure atoll at 1600, April 21, 1961, at which time the tug "Port of Bandon" turned Barge 30 over to Appellants. (Tr. pp. 158-159.) Appellants' LCM took Barge 30 into the lagoon at Kure across the lagoon and to the northwest shore of Green Island where the barge was beached and secured alongside a dock. Thereafter, the tug "Port of Bandon" lay off Kure atoll at a mooring buoy or at anchor.

From the evening of the 21st of April, 1961 to the morning of the 22nd of April, 1961, the "Port of Bandon" was secured to the Coast Guard mooring buoy about 600 yards south of the reef. (Tr. p. 159.) Shortly prior to noon on April 22, 1961, the "Port of Bandon" moved away from the mooring buoy so that a Navy tanker could tie to the buoy. (Tr. p. 159.) The "Port of Bandon" then anchored approximately 1200 yards from the mooring buoy and approximately 450 yards south of the reef. (Tr. p. 160.) The vessel was anchored with a Danforth anchor and approximately 400 feet of anchor cable. (Tr. p. 160.) The vessel had a draft of approximately 8 feet (Tr. p. 186) and lay anchored in 60 feet of water (Tr. p. 160). The "Port of Bandon" remained at this anchorage from midday April 22, 1961, until shortly after noon on April 24, 1961. (Tr. pp. 164-165.)

From April 22, 1961 through April 24, 1961 visual bearings were constantly being taken in order to check against any possible dragging of the anchor. (Tr. p. 163.) During this period the anchor never dragged. (Tr. pp. 164, 219.) During this same period the depth of the water never fell below 50 feet. (Tr. p. 160.)

On April 23, 1961 the Coast Guard cutter Ironwood anchored between the "Port of Bandon" and the buoy (Tr. p. 161), and approximately 450 yards off the reef (Tr. p. 162).

From noon April 22, 1961, until the morning of April 24, 1961 the wind was from the east northeast. (Tr. pp. 161, 163.) During this period the "Port of

Bandon" enjoyed a lee from the reef. (Tr. p. 161.) On the morning of April 24, 1961 the wind changed and began coming from the east and increased somewhat in force. (Tr. p. 164.) At about noon on April 24, 1961, because of an uncomfortable ride at that anchorage, the master of the "Port of Bandon" decided to pick up anchor and seek a new anchorage in the lee of the island, or "dog it" until the barge was due out. (Tr. pp. 164-165.) While in the process of picking up the anchor the "Port of Bandon" struck whatever caused its flooding and eventual grounding. (Tr. p. 165.) At the moment of striking this unknown object, the "Port of Bandon" was approximately 450 yards off the reef. (Tr. p. 167.) The vessel began to take on water faster than the vessel's pumps could pump it out and her master then proceed to run the vessel through a small channel in the reef and into shallow water within the lagoon where it was grounded. (Tr. pp. 166-167.)

While Barge 30 was at Kure it was secured to the dock with its stern aground on the sand. (Tr. p. 167.) On May 22, 1961, Barge 30 was taken out of Kure Lagoon by Appellants' LCM and was then towed by a Navy tug to Midway Island. (Tr. p. 72.)

SUMMARY OF ARGUMENT

The controlling question before the trial court was with respect to the negligence of Appellee. On this question the Court found that Appellants had not proved negligence by a preponderance of the evi-

dence. Appellee submits that the finding of no negligence was borne out in the evidence.

Appellee commences its argument with a review of the authorities concerning admiralty appeals where the appellant predicates error on a finding of fact. It is well established that findings of fact will not be set aside unless clearly erroneous and it is submitted that the evidence overwhelmingly supports the trial court's findings of fact and they should not be disturbed.

Appellee then counters Appellants' theory that contractual provisions exculpating one of the parties from its negligence are against public policy and void. Appellee points out that Congress has seen fit to limit the liability of carriers and vessel owners through legislation and, therefore, the argument that such provisions are against public policy is untenable. Appellee further contends that this particular issue is not a proper subject for review at this time because the trial court was not called upon to consider it. Thus, should this Court find that the vessel was lost through the negligence of her master, then whether the contract would exculpate Appellee from its own negligence would be a matter for the trial court upon remand.

In reviewing Appellants' second specification of error, Appellee points out that all of Appellants' theories were necessarily predicated upon negligence, because the contract between Appellants and Appellee explicitly relieves Appellee of further performance in the event of a loss of either the tug or barge.

Appellants' contention is that a negligent loss will not relieve Appellee from performance. Thus, the Court did not err in finding that all of Appellants' theories were predicated upon negligence.

Appellee argues that the Harter Act, 46 U.S.C. 190-196 is inapplicable in this case for several reasons. First, the contract between Appellee and Appellants constituted a private charter, a relationship to which the Harter Act does not apply. Secondly, the Harter Act limits liability of vessel owners where there has been physical injury to cargo, a factor in no way involved here. Thirdly, the parties did not intend that the Harter Act would apply because the contract embodies provisions expressly forbidden by the Harter Act and the courts will not isolate one provision of a contract which will result in negating other provisions.

In the alternative, Appellee urges that if the Harter Act is found to be applicable, then Appellee would not be liable to Appellants because not only was the tug "Port of Bandon" seaworthy at the commencement of the voyage, but also the striking of the object which caused the eventual grounding of the vessel could only be the result of an error in navigation and management of the vessel.

It is concluded that the judgment should be affirmed.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ITS FINDING THAT APPELLANTS DID NOT PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE LOSS OF THE TUG "PORT OF BANDON" WAS PROXIMATELY CAUSED BY APPELLEE'S NEGLIGENCE

The controlling question in the trial below was whether or not the tug, "Port of Bandon", was lost through the negligence of her master. After hearing three days of testimony, the Court rendered a written decision wherein it found that Appellants failed to sustain their burden of proof on this issue and, consequently, were not entitled to recover damages either under the contract or otherwise.

Before considering various matters contained in Appellants' brief, it is well to review the authorities with respect to appeals on questions of fact. Prior to 1954 the appellate procedure in admiralty cases was unlike appeals in non-admiralty cases, the difference being that in admiralty an appeal was deemed a trial de novo and, though the trial court's findings of fact and conclusions of law were given certain weight, they were in no way binding on the appellate court. This procedure was all but terminated in *McAllister v. United States*, 348 U.S. 19, 99 L.ed. 20 (1954) wherein the court stated in 348 U.S. at page 20:

"In reviewing a judgment of a trial court, sitting without a jury in admiralty, the court of appeals may not set aside the judgment below unless it is clearly erroneous. No greater scope of review is exercised by the appellate tribunals in admiralty cases than they exercise under Rule 52(a) of the Federal Rules of Civil Procedure."

As to what constitutes a “clearly erroneous finding” the court went on to state in 348 U.S. at page 20:

“A finding is clearly erroneous when ‘although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.’”

In essence then, the Supreme Court in the *McAllister* case engrafted Rule 52(a) of the Federal Rules of Civil Procedure into the admiralty rules. In substance, this rule gives rise to a presumption that the findings of fact of the trial court sitting without a jury are correct. 2B Barron and Holtzoff, *Federal Practice and Procedure*, Sec. 1131. Appellants bear the burden of showing that the findings of the trier of fact are clearly erroneous. *Watson v. Button*, 235 F.2d 235 (9th Cir. 1956).

It is a fundamental principle that in an appeal the appellate court must consider the evidence most favorable to Appellee, and indulge in all reasonable inferences which may be drawn from the evidence. *Worcester Felt Pad Corp. v. Tucson Airport Authority*, 233 F.2d 44 (9th Cir. 1956).

The United States Court of Appeals for the Ninth Circuit has voiced the “clearly erroneous” principle on numerous occasions. In *Clinton v. Joshua Hendy Corp.*, 264 F.2d 329 (9th Cir. 1959) a libel for maintenance was filed and the libellant appealed. In affirming the lower court, this court stated at page 333:

“In considering the alleged error referred to in the first assignment, we must keep in mind that in

admiralty matters there is no longer a trial de novo on appeal, and the federal appellate tribunals have no greater scope of review in admiralty actions than they have under Rule 52(a) of the Federal Rules of Civil Procedure, *McAllister v. United States*, 1954, 348 U.S. 19, at page 20, 75 S.Ct. 6, at page 8, 99 L.ed. 20. Further, the burden is on appellant to show that the findings of the trier of fact are clearly erroneous. *Watson v. Button*, 9 Cir., 1956, 235 F.2d 235.

“The findings of the court are presumptively correct and will not be set aside unless clearly erroneous. Rule 52(a), Fed. R. Civ. P.

“The appellee Joshua Hendy Corporation, despite the judgment against it, is not the appealing party, and hence is the prevailing party. In such a case we are required to take the view of the evidence most favorable to appellee.” (citations omitted)

See also

United States v. Staples, 256 F.2d 290 (9th Cir. 1958);

States Steamship Co. v. Permanente Steamship Corp., 231 F.2d 82 (9th Cir. 1956);

City of Long Beach v. National Development Co., 289 F.2d 586 (9th Cir. 1961);

Ramos v. Matson Navigation Co., 316 F.2d 128 (9th Cir. 1963).

Not only is there a presumption of correctness of the findings of fact and conclusions of law but these are binding on appeal unless clearly erroneous. Thus,

in *American President Lines, Ltd. v. Redfern*, 345 F.2d 629 (9th Cir. 1965) a libel was filed to recover for personal injuries sustained while working on a boiler. One of the issues involved was the contributory negligence of the libellant, and on this matter the appellate court stated at page 632:

“The trial court’s factual determination that Redfern was not guilty of contributory negligence in attempting to open the valve is of course conclusive on appeal unless ‘clearly erroneous’.”

One of the paramount reasons for not disturbing the findings of the lower court is because the trier of fact has the opportunity to hear all of the witnesses. In *Griffin v. Gardner*, 196 F.2d 698 (9th Cir. 1952) an action arose under the Carriage of Goods by Sea Act, 46 U.S.C., Sections 1300-1315 and the district court found that the ship was seaworthy and that there was no negligence. The libellant appealed and in discussing the question presently under review, it stated at page 700:

“... In this setting the trial judge had to weigh the testimony and determine from the appearance and demeanor of the witnesses whether the stories they told portrayed the true facts concerning all matters in dispute. Appraising the credibility of these witnesses and the weight to give their stories was his function. We would not be justified in rejecting his findings on issues of fact unless, in light of the record, they failed to set forth a sufficiently clear picture of the fact situation they purported to cover for an appellate court to understand the basis of the court’s conclusions of law and decree . . .”

The court went on to state the following at page 701:

“The rule is plain that the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the appellate court unless it is clearly against the weight of the entire body of evidence . . .”

See also

Tawada v. United States, 162 F.2d 615 (9th Cir. 1947) and

Vileski v. Pacific-Atlantic S. S. Co., 163 F.2d 553 (9th Cir. 1947).

In light of the above authorities, the question is whether or not the findings of the trial court are supported by the evidence.

Appellants' brief commences with a review of the evidence and it is necessary at this juncture to see if Appellants' sundry statements of the evidence are borne out in the record. Appellants' brief, page 9, states that Captain Locey did not know the length of his ship. To the contrary, Captain Locey's testimony was that the vessel had a registered length of 80 feet but at the time of the trial he could not recall her over-all length though he knew what it was when he operated her. (Tr. pp. 203-204.)

Appellants' brief, page 9, states that Captain Locey had no experience in tropical coral reefs. To the contrary, Captain Locey had anchored in coral before though this was the first time in the type of coral such as that at Kure Island. (Tr. pp. 218-219.)

Appellants' brief, page 9, states that Captain Locey had no charts of Midway Island. To the contrary,

Captain Locey testified that he had no charts of "Midway Harbor". (Tr. p. 214.) It is at least doubtful whether the Navy will furnish anyone with a chart of Midway Harbor.

Appellants' brief, page 11, states that the Coast Guard findings locate Captain Locey closer to the reef than 450 yards. To the contrary, the Coast Guard findings placed Captain Locey 1200 yards west of the mooring buoy in 60 to 65 feet of water and approximately 450 yards south of the reef. (Respondents' Ex. G, p. 1.) The bearing of 254 degrees from the radar reflector was obviously erroneous because this would not be consistent with the other Coast Guard findings. At the trial, Captain Locey testified that he anchored in 60 feet of water (Tr. p. 160), 1200 yards west of the Coast Guard buoy (Tr. p. 160) and approximately 450 yards south of the reef (Tr. p. 160). Furthermore, the Coast Guard bearings were not taken off of the Coast and Geodetic Survey Chart No. 4177. (Tr. p. 230.)

Appellants' brief, page 12, states that Smith saw the vessel leave the mooring buoy and observed where it anchored. However true this may be, Smith also testified that it was hard to judge distances from where he could observe (Tr. p. 17) and that he could only observe the vessel from one point on the island (Tr. p. 21). Furthermore, Smith testified that the location of the anchorage on the 22nd did not cause him any concern. (Tr. p. 18.)

Appellants' brief, page 16, states that on April 24th Captain Locey got under way because he felt that he might be dragging anchor. To the contrary, Captain

Locey emphatically testified that at no time did he ever drag his anchor. (Tr. pp. 164, 187, 219.)

Appellants' brief, page 18, states that the depth of the water where Captain Locey anchored on April 22nd was between a "high" of 50 and 60 feet. To the contrary, Captain Locey testified that he anchored in 60 feet of water and that the least depth that he ever recorded was 50 feet. (Tr. p. 160.)

Appellants set forth the above facts in an attempt to have this Court find that the loss of the vessel was through negligence. It is clear that Appellants' view of the facts was not borne out by the evidence.

Starting from the presumption that the findings of fact and conclusions of law of the trial court were correct, Appellee now sets forth the record evidence which will sustain the decision of the lower court.

It is undisputed that Captain Locey was a man of vast experience on the seas and had been the master of many tugs. (Tr. pp. 154-157.) The trial court found Captain Locey to be a man of experience (Dec. p. 4, lines 4-9), wherein it stated:

"This man was apparently a highly qualified tug master with experience of many different conditions along the west coast of the United States up to Alaska, and even though his experience did not include towing in tropical areas such as Hawaii and Kure, the court believes he was a competent tug master."

There is no dispute with the fact that when the tug arrived off Kure Island on April 21st, it anchored at the Coast Guard mooring buoy, which buoy was

located in 60 feet of water. (Respondents' Ex. G.) Thereafter, on April 22nd the tug was forced to leave the buoy because a Navy tanker came in and needed to tie to the buoy in order to discharge fuel. (Tr. p. 159.) From this point Captain Locey moved west approximately 1200 yards and anchored approximately 450 yards south of the barrier reef. (Tr. p. 160; Respondents' Ex. G.) When he anchored, he put out 400 feet of anchor cable in 60 feet of water. (Tr. p. 160.) The reason for anchoring in this location was because of the direction of the winds, this anchorage thereby placing him in the lee of the island. (Tr. p. 161.)

The uncontroverted evidence is that from April 22nd to April 24th, the day of the mishap, Captain Locey constantly took depth recordings and the least sounding that he ever received was 50 feet. (Tr. p. 160.)

On April 23rd a Coast Guard ship, the Ironwood, came to Kure Island briefly and anchored between the tug and the mooring buoy and about 450 yards off the reef. (Tr. pp. 161-162.) It would seem obvious that if vessels with much deeper drafts than a tug and with considerably less maneuverability than a tug considered their anchorages safe, Captain Locey was justified in anchoring where he did.

In order to provide safety for the tug and to guard against dragging the anchor, Captain Locey and his crew maintained 24-hour watches. (Tr. p. 162.) One of the ways in which they checked against a dragging of the anchor was to take almost constant visual bear-

ings. (Tr. pp. 160, 163.) Appellants produced no evidence whatsoever that the tug dragged its anchor. When asked whether or not he dragged anchor, Captain Locey testified that his anchor did not drag. (Tr. pp. 164, 187, 219.) Even Appellants' brief admits that there was no persuasive evidence that the anchor dragged. (A. B., p. 19.)

On the morning of April 24th the winds shifted and began coming from the east and the seas began coming from the same direction. (Tr. p. 164.) There was no dragging of the anchor and the tug remained 450 yards off the reef and swinging on its anchor. (Tr. p. 164.) Because of the weather condition and uncomfortable ride, Captain Locey decided to pick up the anchor and while in the process of picking up the anchor, and while still about 450 yards off the reef the tug struck whatever caused the flooding and its eventual grounding. (Tr. pp. 164-165.)

It should be noted that Captain Locey stated that he took soundings just prior to picking up the anchor. (Tr. p. 165.) In this connection he testified that he never obtained a sounding under 50 feet. This would result in a conclusion that on April 24th he was still anchored in water with a minimum depth of 50 feet.

Mr. Smith testified that on April 22, 1961 the location of the new anchorage did not cause him any concern. (Tr. p. 18.)

Much to do was made over the maps and charts that Captain Locey had with him. The uncontroverted testimony is that he had aboard a chart of Kure Island given him by Mr. Kincaid, which chart was

more complete than the United States Coast and Geodetic Survey Chart No. 4177 used at the trial. (Tr. p. 213.) In this connection when asked why he anchored where he did on April 22nd, Captain Locey testified as follows:

“It shows on the chart as being the anchorage area. Also, the Coast Pilot refers to it as vessels having used it. At the time that I anchored up there, the wind, coming from the direction it was coming from, it gave me a lee from the sea and the wind.” (Tr. p. 161.)

When these facts are collected, it is submitted that the evidence unquestionably showed that Captain Locey conducted himself in a prudent seamanlike manner and was not negligent from the moment that he anchored on April 22nd to the moment he began picking up anchor on April 24th or at any other time. The most that can be said is that on April 24th the tug struck an object which necessitated the grounding of the craft. It is a fundamental principle that the mere fact that an accident or injury has occurred, with nothing more, is not evidence of negligence on the part of anyone. *Prosser on Torts*, 3rd Ed., Sec. 39, p. 215.

Appellants' brief appears to take the position that the matters testified to by the experts must be given great weight and that the trial court almost, if not wholly, ignored their testimony. In connection with this testimony, the experts testified on direct examination to hypothetical questions which used chart locations set out by Smith on direct examination. When Smith located the position of the tug on the chart (Libellants' Ex. H) he stated:

“It’s hard to judge distances from the island where I had a chance to observe. I believe he was right in this area here.”

It seems obvious that a location such as this is subject to gross inaccuracies and it is no wonder that the Court was inclined to place more weight on the location of the tug as given by Captain Locey and as set forth in the Coast Guard findings.

It is a well established rule that the weight to be accorded expert testimony is to be determined by the trier of fact. On the effect of such testimony, the following excerpt from 20 Am. Jur., *Evidence*, Sec. 1208, pp. 1059-1060 is illustrative:

“There is, generally speaking, no rule of law which requires controlling effect or influence to be given to, and the court and jury are not required to accept in the place of their own judgments, the opinion testimony of expert witnesses merely because of the special knowledge of the witnesses concerning the matters upon which they give their testimony. Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are generally regarded as purely advisory in character; the jury may place whatever weight they choose upon such testimony and reject it, if they find that it is inconsistent with the facts in the case or otherwise unreasonable.”

In the instant case, after hearing the evidence, the court chose not to find that anchoring where he did was a lack of prudent seamanship and therefore negligence. Thus, the Court stated (Dec. p. 3, lines 30-32; p. 4, lines 1-4):

“Although two expert witnesses for the libellants testified—in answer to hypothetical questions, based on testimony in the case—that in their opinion there was a lack of prudent seamanship on the part of the tug captain, the court is not persuaded that his anchoring at the place he did, with a vessel as small as his, and with a draft of only eight feet, can be considered negligence.”

With respect to the testimony of these experts, it should be noted that neither of them had ever been the master of a tug (Tr. p. 115); neither had ever been to Kure Island (Tr. pp. 115, 250); on cross-examination based upon hypothetical questions composed of the location of the tug as given by Captain Locey both testified that the anchorage on April 22nd was safe (Tr. pp. 119, 257). The corollary to this is that the anchorage would become unsafe if the anchor dragged yet the record is devoid of any evidence of dragging. Therefore, the anchorage through April 24th must have been just as safe as on April 22nd.

Appellants' second point of contention under their first specification of error concerns paragraph 13 of the contract which reads:

“It is mutually agreed that time is of the essence of this agreement, and that Trans Pacific is on notice that Kincaid is under contract penalties to remove the return cargoes from Johnston and Kure, provided, however, that, neither Trans Pacific nor the vessels shall be responsible for loss or damage sustained by Kincaid due to the failure or refusal of Trans Pacific to perform or complete the performance of any transportation service herein provided for, if arising or resulting

from loss of or damage to the vessels, or either of them, or arising or resulting in whole or in part from any other cause beyond the control of Trans Pacific, or if in the opinion of Trans Pacific, or in the opinion of the master of the tug, to perform or complete the performance of the transportation service would result in loss or damage to the cargo or the vessels, or either of them.”

The position taken by Appellants is that assuming that the paragraph excuses Appellee from further obligations under the contract in the event the tug or barge is negligently lost, such provisions are null and void and against public policy.

The contract between Appellants and Appellee was a voyage charter. *Gilmore and Black, supra*, Sec. 4-1, pages 170-173. Charter party carriage such as the present one is looked upon as private carriage and there are no statutory rules forbidding the adjustment of risks in any manner provided by the charter. *Id.* Sec. 4-5, page 181.

The argument that a contractual limitation of liability is contrary to public policy is untenable, especially in the field of admiralty. Illustrative of the public policy in this respect are the federal acts, viz., Carriage of Goods by Sea Act, 46 U.S.C., Sections 1300-1315, and Harter Act, 46 U.S.C., Sections 190-196, which in part read as follows:

Carriage of Goods by Sea Act

“(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

- (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
- (q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier. . . .”

Harter Act

“If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, . . .”

The basic theory behind these acts is that the owners cannot be held liable for negligence in the management of the vessel. It therefore follows that paragraph 13, assuming it does absolve Appellee of negligence, would not be against public policy.

Admittedly, there is a conflict in the authorities as to whether or not the parties can contract against negligence. The *Restatement of Contracts*, Sec. 574 recognizes the validity of such contractual provisions and states:

“§ 574. Legal Bargains For Exemption From Liability For Negligence.

A bargain for exemption from liability for the consequences of negligence not falling greatly below the standard established by law for the protection of others against unreasonable risk of harm, is legal except in the cases stated in § 575.”

Restatement of Contracts, Sec. 575 referred to above concerns liability for the consequences of a willful breach of duty and is inapplicable to the present discussion. One of the most important factors in determining the validity of such exculpatory clauses is whether or not the contracting parties are on an equal footing so far as bargaining power is concerned. See Annotation 175 ALR 8 “Validity of contractual provision by one other than carrier or employer for exemption from liability, or indemnification, consequences of own negligence.” This principle was recognized by the drafters of the Harter Act and the Carriage of Goods by Sea Act as pointed out in *Gilmore and Black, supra*, Sec. 4-2, p. 175 wherein it is stated:

“It has been felt, apparently, that the bargaining power of charterers and owners is equal enough that they may be left to contract freely, a situation in sharp contrast to the great disparity between shiplines and the shippers of package cargo.”

Clearly there was no disparity in bargaining power between Appellants and Appellee.

In essence, paragraph 13 was intended by the parties to relieve Appellee of further performance under the contract if any one of the following conditions was met:

1. Loss or damage to the tug or barge;
2. Loss or damage arising or resulting in whole or in part from any other cause beyond the control of Appellee; or
3. If, in the opinion of Appellee, or in the opinion of the master of the tug, to perform or complete performance of the transportation service would result in loss or damage to the cargo or the vessels, or either of them.

In substance, the first condition obviously means loss or damage through the negligence of Appellee or its employees. This is necessarily so because the second condition concerns losses or damages beyond the control of Appellee thereby causing losses or damages under part 1 to be from causes within the control of Appellee.

One of the early cases dealing with exculpatory provisions in towage contracts was *The Oceanica*, 170 F. 893 (1909 C.C.A.2d) cert. den. 215 U.S. 599, 30 S.Ct. 400, 54 L.ed. 343 wherein there was a towage contract under the terms of which the tow agreed to assume all risks. Discussing whether the tow had assumed the risk of the tug's negligence, the Court stated at pages 894-895:

"A tug is not, in relation to its tow, a common carrier, being only bound to the exercise of ordi-

nary care. *The Margaret*, 94 U.S. 495, 24 L.ed. 146. It follows that a contract against liability for negligence cannot be construed in the case of a tug as it may in the case of a common carrier. The tug being only liable for negligence, if the tow agrees to assume all risks, no risks can be met except as those for which the tug is liable, viz., the consequences of her own negligence. There is no other class of risks upon which the clause can operate as in the case of common carriers, viz., those arising from liability as insurer. Unless construed to cover the tug's negligence, the stipulation is meaningless; i.e., an agreement by the tow to assume risks to which she is subject without any stipulation and for which there is no liability at all on the part of the tug . . ."

Thus, the Court recognized the validity of such clauses.

With respect to the decision in *The Oceanica*, *supra*, Justice Frankfurter, in his dissenting opinion in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 99 L.ed. 911 (1955) stated 349 U.S. at pages 108-109:

"Concededly, the Second Circuit has, ever since the decision in *The Oceanica* (NY) 170 F. 893 (1909), upheld the validity of agreements whereby towage avoid liability for their own negligence. Its most recent reiteration of this position is found in *Nielson v. United States* (NY) 209 F.2d 958, today reversed on other grounds, post p. 939. To the Second Circuit there must now be added the Courts of Appeals for the Fourth and Fifth Circuits by virtue of their decisions in this case and in *Boston Metals Co. v. The Winding Gulf* (Md.) 209 F.2d 410, *revd* 349 U.S. 122,

99 L.ed. 933, 75 S.Ct. 543. It is not without significance that the Second and Fifth Circuits are first and second in volume of admiralty litigation.”

Appellants’ brief, page 26, asserts that paragraph 13 is too ambiguous to be construed a clause which would exculpate the Appellee for damages suffered by Appellants. Appellee fails to see wherein the ambiguity lies. As pointed out above, paragraph 13 comprehends loss or damage to the tug or barge through causes within the control of Appellee *or* loss or damage resulting from causes beyond the control of Appellee. Obviously a negligent loss would be a loss within the control of Appellee and the parties clearly intended to exculpate Appellee in the event of such a contingency.

Though Appellee firmly believes that paragraph 13 of the contract absolves it from negligent loss of the tug, Appellee further contends that this issue is not a proper subject for determination on the present appeal. The reason is because the trial Court found that Appellee was not negligent and, therefore, was not liable to Appellants. The issue as to whether or not paragraph 13 would absolve Appellee from its negligence was never considered. Had the Court found Appellee negligent then, and only then would the issue have arisen. Assuming for purposes of argument that this Court should find Appellee to have been negligent, then this Court should remand the case to the District Court for a determination of this issue.

Finally, Rule 18 of the United States Court of Appeals for the Ninth Circuit specifically provides:

“2. This brief shall contain, in order here stated—(d) in all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged.”

Appellants' brief has not specified this issue as an error and, therefore, it should not be considered on this appeal. Indeed, because the Court made no finding on this matter, there could be no error to specify.

Pursuant to Rule 18(3) of the rules of the United States Court of Appeals for the Ninth Circuit, Appellee herein sets forth record references to the evidence relied upon by Appellee as supporting the trial Court's finding of fact that Appellants did not prove by a preponderance of the evidence that the loss of the tug “Port of Bandon” was proximately caused by Appellee's negligence.

Howard Jones

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“ 117, “ 5-7

“ 118, “ 9-25

“ 119, “ 1-12

Wayne Locey

Page 154, lines 8-25

“ 155, “ 1-25

“ 156, “ 1-25

“ 157, “ 1-25

“ 160, “ 1-19

Wayne Locey (continued)

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Chester A. Jackson

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| Page | 256, | lines | 3-25 |
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Captain Jackson

| | | | |
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| " | 257, | " | 1-22 |
| " | 258, | " | 5-19 |

II. THE TRIAL COURT DID NOT ERR IN FINDING THAT ALL OF APPELLANTS' THEORIES WERE PREDICATED UPON FINDING THAT APPELLEE WAS NEGLIGENT

Appellants' second specification of error is that the trial Court erred in finding that all of Appellants' theories were predicated upon a finding that Appellee was negligent. The main thrust of Appellants' argument is summed up at page 30 of Appellants' brief as follows:

"Kincaid contends that Trans-Pacific should not be excused for its failure to perform under a contract for the reason of 'impossibility' because the impossibility was caused by his negligence in sending out an inexperienced captain and crew in strange waters with no charts."

In essence, Appellants refute their own specification of error because they state that impossibility is no defense if it is brought about by negligence. Thus, whether or not Appellee is liable to Appellants would depend upon whether Appellee was negligent.

The pre-trial order sets forth Appellants' theories as follows:

"(a) Respondents could have chartered another seagoing tug to return Barge 30 to Honolulu so that impossibility is not available as a defense.

"(b) Respondents are not excused from performance for the reason that it cannot show that the loss of its tug was due to causes beyond its control.

"(c) Respondents cannot rely upon the provisions of its contract to excuse itself from an obli-

gation to perform its contract for the reason that the terms thereof are void and against public policy and unenforceable.”

Under theory (a), paragraph 13 of the contract would be a defense to further performance if the trier of fact found no negligence. The impossibility of performance argument would be irrelevant. Under theories (b) and (c) the controlling issue is clearly negligence.

Appellants' main contention here is that the Harter Act, 46 U.S.C., Sections 190-196 is applicable to the present controversy and it suggests that this is the position taken in the Court below by Appellee. It should be pointed out that Appellee never asserted the Act was applicable and, in fact, contends that it has no application. Appellants state (A. B., p. 33) that the Carriage of Goods by Sea Act, 46 U.S.C., Sections 1300-1315 is inapplicable because the contract contained no express words incorporating it and, therefore, the Harter Act is applicable if either Act is applicable. Note that there were no express words adopting the Harter Act either. A reading of the Harter Act indicates that it is inapplicable because it is directed at limitation of liability for the loss or damage to merchandise or property arising from neglect, fault, or failure in proper loading, stowage, custody, care, or proper delivery. (46 U.S.C., Sec. 190.) In other words, the Act relates directly to physical damage to merchandise or property (i.e., cargo) a factor which in no way is involved here.

Appellants predicate this assignment of error on the theory of breach of contract through negligence. The Harter Act was enacted to limit the liability of carriers but not with respect to breach of contract matters.

It is well established that the Harter Act is inapplicable to private charter situations. *Gilmore and Black, supra*, page 175. Indeed, the Act can be adopted by contract in such instances but Appellee submits that the Act was not adopted nor intended to be adopted under the contract between Appellee and Appellants. Appellants contend that the Act was adopted by virtue of paragraph 15 of the contract, which paragraph provides:

“15. Trans-Pacific shall have all rights to limitation of and exemption from liability as are granted by federal statutes to owners and charterers of vessels, and nothing herein contained shall constitute a waiver thereof.”

The guidelines for contract construction are set forth in 17 Am. Jur. 2d, *Contracts*, Sec. 258 wherein it is stated:

“It is a universal rule that in construing contracts the courts attempt to arrive at the intention of the parties as expressed in the instrument as a whole. The contract being construed is to be considered as a whole and the meaning gathered from the entire context, and not from particular words, phrases, or clauses, or from detached or isolated portions of the contract. All the words in a contract are to be considered in determining its meaning, and the entire contract in all of its parts

should be read and treated together. This is so because each portion of a contract is qualified by other portions which are relevant thereto, and has no separate existence apart from them. Moreover, the entire agreement is to be considered, to determine the meaning of each part . . .”.

The Harter Act, 46 U.S.C., Sec. 190, in substance provides that it is unlawful for a carrier to contract against its negligence. With this in mind, note paragraphs 12 and 13 of the contract which specifically contract against negligence. Starting with the premise that the Harter Act is inapplicable to private charters such as existed in the instant case, it would be illogical to conclude that the contracting parties intended to adopt a Federal Act which would negate two of the paragraphs of the contract. The only construction that can be given to paragraph 15 is that in the event a Federal Act existed which would limit liability of owners or charterers of vessels and which Act was consistent with the contract, then such Act was to become a part of the contract. Assuming for purposes of argument that the Harter Act is found to be applicable, it is Appellee's position that it would not be liable to Appellants because there is an abundance of evidence that the vessel was seaworthy. It is well settled that the time for applying a test of seaworthiness is at the moment the voyage commences. *The Havana*, 45 F. Supp. 244 (1942 D.C.S.D.N.Y.). See also *Cullen Fuel Co. v Hedger*, 200 U.S. 82, 54 S.Ct. 10, 78 L.ed. 189 (1933) (re implied warranty of seaworthiness). The owner of the vessel need only exer-

cise due diligence in making the vessel seaworthy. 46 U.S.C., Sec. 192. Once it is established that the vessel is seaworthy, then if the loss occurs through a fault or error in navigation or in the management of the vessel, the owners are not liable. 46 U.S.C., Sec. 192.

Appellee contends that the vessel was seaworthy when the voyage commenced and that the loss of the vessel was, at most, through an error in navigation. The uncontroverted facts showed the following:

That Captain Locey was a highly experienced sea captain (Tr. pp. 154-157) and the trial court found him to be competent (Dec. p. 4, line 9); that the vessel was physically in good condition to commence the voyage (Tr. pp. 157, 176-177); and that Captain Locey had aboard adequate charts of Kure Island (Tr. pp. 161, 213-214).

There is no evidence that the vessel dragged its anchor at any time after anchoring on April 22nd and this was so found by the lower court. (Dec. p. 4, lines 21-22.) Thus, if Captain Locey should have anchored in a different location or gotten under way earlier on April 24th, this would be an error in navigation or management of the vessel which are matters upon which no liability can be predicated under the Harter Act. If it was a negligent stranding, then it was an error in navigation and management of the vessel. *The Monarch of Nassau*, 155 F.2d 48 (5th Cir. 1946.)

Appellants cite cases for the proposition that under the Harter Act the burden is upon the carrier to show due diligence in making the vessel seaworthy. With

this proposition Appellee has no quarrel. However, Appellants cite the case of *Moran v. United States*, 82 F.Supp. 525 (1949 D.C.S.D. Mass.) for the proposition that a tugboat is unseaworthy because of a deckhand's lack of qualification and experience. Appellee points out that the cited case arose after a stevedore fell from a defective ladder on a ship and thereafter filed a libel in admiralty for his injuries. The Court merely held that the respondent was negligent in maintaining a ship with a ladder not securely fastened to the side of the hold and, therefore, the ship was unseaworthy.

Appellants cite *The Nordpol*, 84 F.2d 3 (2d Cir. 1936) for the proposition that if one employs a seaman who cannot understand orders the boat is not seaworthy or properly manned. Appellee points out that in the cited case a libel was filed due to a collision and the Court held that respondent's vessel was unseaworthy because the helmsman could neither speak nor understand English.

It is submitted that the evidence in the instant case established that the vessel was properly manned and this evidence was uncontroverted by Appellants.

CONCLUSION

It has been the purpose of this brief not only to refute the arguments of the Appellants, but also to draw forth the evidence adduced in the trial Court below in order to establish that it did not err in its finding of fact.

It is submitted that Appellants have failed to sustain any of their specifications of error and that, therefore, the judgment of the trial Court below should be affirmed.

Dated, Honolulu, Hawaii,
April 1, 1966.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals, for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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No. 20,737

IN THE

United States Court of Appeals
For the Ninth Circuit

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Giuli Joint Venture,

Appellants,

VS.

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INC., and CLARENCE C. T. LOO,

Appellees.

Appeal from the District Court of the United States
for the District of Hawaii

Honorable C. Nils Tavares, Judge

REPLY BRIEF OF APPELLANTS

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Honorable C. Nils Tavares, Judge

REPLY BRIEF OF APPELLANTS

STATEMENT OF CASE

Appellee's Answering Brief raises three basic questions:

(1) On the merits themselves, did the Court below reach the right result, namely, a finding that Appellants failed to sustain their burden of proof?

(2) Under what circumstances should a Court of Appeals set aside the judgment of a District Court, sitting in admiralty without a jury?

(3) Even if this Court should find that the Court below was in error in finding that Appellants failed to prove negligence on the part of the tug, should this Court review the question of whether exculpatory clauses in towing contracts are void and against public policy?

We feel that the first question above should be left for oral argument rather than for further written briefs.

As to the second question, we basically agree with the authorities set out by Appellee as to the circumstances under which a Court of Appeals may reverse the findings of the District Court, but would not be bringing this appeal unless we believed that the judgment of the Court below was "clearly erroneous", and again suggest that this is a matter for oral argument.

Regarding the third question raised, whether this Court should now review the validity of exculpatory clauses in towage contracts, we submit that this Court need not review the question, in a sense, as it is a matter clearly decided by the Supreme Court of the United States, and should this Court reverse the findings of the Court below, the cause should be remanded, not for the purpose of ruling on the question but to assess damages.

SUMMARY OF ARGUMENT

The question of validity of exculpatory clauses in towage contracts which would purport to excuse the tug from liability for its own negligence has been

clearly decided by the United States Supreme Court, and is not subject to review by this Court.

ARGUMENT

Appellee in its Answering Brief has appeared to argue that a clause in a towage contract purporting to excuse the tug from its own negligence is valid and enforceable, and therefore, even if the Court below was in error as to the tug's negligence, it, the Appellee, is not liable to Appellants because such negligence is excused by the terms of the contract.

Appellee cites the case of *The Oceanica*, 170 F. 893 (1909 C.C.A. 2d) cert. den. 215 U.S. 599, 30 S. Ct. 400, 54 L. Ed. 343. The Court in that case admitted that it was departing from previous decisions in holding that a tug could escape liability for its own negligence to the tow under a contract provision so excusing it, and stated at 170 F. 900 that:

“The question should, and we hope will, be set at rest in this case by the Supreme Court.”

The Supreme Court chose to deny certiorari, but some years later in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 99 L. Ed. 911 (1955) met the question squarely and held that regardless of the terms of the towage contract, the tug cannot escape liability for its own negligence. Appellee quotes in its brief from the dissent in the *Bisso* case, but the majority opinion could not be clearer. It is pointed out that it had previously held in *The Syracuse*, 12 Wall. 167 (1871)

that notwithstanding the terms of a towage contract whereby all risks were to be assumed by the tow, the towboat "must be visited with the consequences" of its negligence. The Court pointed out that the Second Circuit in *The Oceanica*, supra, stood alone in its position and clearly put the issue to rest. In his dissenting opinion in the *Bisso* case, Mr. Justice Frankfurter, in a caustic mood, denounces this Circuit as being the only Circuit to differ with the Second Circuit's decision in *The Oceanica*, supra. He says at 349 U.S. 99-100:

"The Circuits other than the Ninth do not disclose decisions that towboats cannot by contract escape liability for negligent towage. In the Ninth, there is talk, not decision."

Mr. Justice Frankfurter goes on to cite various decisions of this Circuit to show that the contentions of the Appellants herein have always been the position of this Circuit. *Alaska Commercial Co. v. Williams*, 128 F. 362, *Myloie v. British Columbia Tug Co.*, 268 F. 449, *Hall-Scott Motor Car Co. v. Universal Ins. Co.*, 122 F. 2d 531.

It is submitted that if this Court should reverse the finding of the Court below, then there is nothing for this or the Court below to decide regarding the validity of a contract provision which purports to excuse a tug from its own negligent acts, as the law is perfectly clear.

CONCLUSION

The judgment of the Court below should be reversed and the District Court should be directed to assess damages against Appellee, perhaps after further hearings thereon.

Dated, Honolulu, Hawaii,
April 11, 1966.

Respectfully submitted,
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By ROBERT M. ROTHWELL,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals, for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT M. ROTHWELL,
Attorney for Appellants.

United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 20740-1 ✓

R. A. HENDERSON,

Appellant,

vs.

A.C. SPARK PLUG DIVISION of
GENERAL MOTORS CORPORATION,

Appellee.

-and-

R. A. HENDERSON,

Appellant,

vs.

FORD MOTOR COMPANY,

Appellee.

BRIEF FOR APPELLANT

R. A. HENDERSON

FEB 14 1967

APPEAL FROM

THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

SOUTHERN DIVISION

FILED

MAR - 6 1966

WM L. LUCK, CLERK

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NO. 20740-1

These are appeals from summary judgments entered November 22, 1965 by the Southern District Court of California, Southern Division dismissing with prejudice plaintiff's amended complaints against defendant A.C. Spark Plug Division of General Motors and defendant Ford Motor Company.

The District Court's jurisdiction was invoked under 28 U.S.C. 1338 (a). Timely Notices of Appeal were filed on December 27, 1965. This Court's jurisdiction is based on 28 U.S.C. 1291.

STATEMENT OF THE CASE

FACTS

Appellant brought separate actions against appellees alleging infringement of his U.S. Patent No. 3,088,447. Both appellees moved the Court for summary judgments on the grounds of lack of validity of the patent.

That in connection with said motion, testimony was taken from Mr. Kotts, an expert appointed by the Court. See Reporter's Transcript dated November 8, 1965, page 8, line 11 and line 23 and following.

Mr. Kotts testified that it was a factual issue as to whether or not the subject invention was on sale more than one year before appellant applied for a patent thereon. See said Reporter's Transcript, page 11, lines 4 through 16 and page 18, lines 18 through 24. Mr. Kotts described the issue as being whether or not a person skilled in the art could make the Henderson device from his disclosure in his original application. See Exhibit 1 of Record (File Wrapper) and Transcript, page 11 (bottom) and top of page 12.

Also, at the hearing on said date testimony was heard concerning the disclosure in Hanks Patent No. 2,354,373 as it relates to appellants.

Mr. Kotts testified that from reading both patents it was "fairly clear" that the Hanks patent anticipated the Henderson

patent. See said Reporter's Transcript page 14, lines 16 through 21.

On the other hand, Mr. Neill, an expert called by appellant testified as to numerous factual distinctions between the Hanks patent and the Henderson patent. Reference is to said Reporter's Transcript pages 25 to 50. For example, at least one feature of the Henderson device was described as exactly opposite that of the Hanks device. Attention is called to page 46, lines 11 and 12 thereof.

At the hearing the appellant Mr. Henderson gave direct testimony on factual differences between his device and the earlier Hanks device. See page 22, lines 15 through 25 of said Reporter's Transcript.

The Court granted the summary judgments on the grounds that the appellants invention was anticipated by the Hanks patent. See document entitled "Conclusions of Law," at page 18, beginning line 15 of the Transcript of Record (in favor of General Motors) and page 85, beginning line 2 thereof in "Findings of Fact" (in favor of Ford Motor Company).

Also, the Court based its summary judgment on its finding that, "the earliest filing date which can be accorded the patent in suit is December 5, 1961." Page 18, line 11 of Record; that alleged infringing device was sold September, 1960 (page 17, line 26 of Record).

Since the district court has held the sole remaining claim (claim 6) to appellant's patent invalid the contentions of

appellant are equally applicable to both defendants. For convenience the contents of this brief are submitted against both appellees. The validity of the patent affects both defendants equally. The same facts and law are pertinent in both cases. The action has not yet proceeded to matters of alleged infringement and damages.

RULES AND STATUTES INVOLVED

1. RULES OF CIVIL PROCEDURE for the district courts of the United States.

Rule 56 (c) The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

2. A party can move for summary judgment with or without supporting affidavits. Rule 56 (a), (b).

The opposing party may serve affidavits. Rule 56 (c) The court considers pleadings in deciding on the motion. Rule 56 (c), also, when a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. Rule 43 (e).

3. Title 35 U.S. Code 101. Whoever invents or discovers any new and useful process, machine, manufacture, or composition

of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

Title 35 U.S.C. 102. A person shall be entitled to a patent unless--

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent.

Title 35 U.S.C. 103. A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the difference between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.

35 U.S.C. Chapter 11, section 111. APPLICATION FOR PATENT. Such application shall include: (1) a specification as prescribed by section 112---

35 U.S.C. Chapter 11, section 112. SPECIFICATION. The specification shall contain a written description of the invention in such full, clear, concise and exact terms as to enable any person skilled in the art----to make and use the same, etc.

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

SPECIFICATION OF ERROR RELIED ON

The District Court erred in holding that the pleadings and testimony did not raise any genuine issue on any material fact.

QUESTIONS PRESENTED

Does the expediency of a dismissal summarily given outweigh the patent purpose on an important invention (smog control device) where the parties do not agree on facts pertinent to the alleged anticipation?

SUMMARY OF ARGUMENT

Two strong presumptions should be applied in favor of the appellant. The first presumption is that his patent is valid. The second presumption is against a summary judgment.

The court found no genuine issue of fact. Apparently its reliance for such a finding was upon the testimony of an expert. The appellant of course assumed the validity of his patent by alleging the infringement thereof. The expert testified to the factual invalidity thereof. The expert's testimony is pregnant with admissions that issues of fact exist. Other witnesses testified often as to facts tending to show patent validity.

In any event, there are not sufficient elements for sustaining the drastic remedy of a summary judgment. Testimony

for and against the motion was very short as the proceeding was not a substitute for trial. See Federal Civil Practice, California Continuing Education of the Bar page 378, paragraph (5).

PUBLIC POLICY FAVORS UPHOLDING PATENT

The patent monopoly was designed as an award, an inducement, to bring forth new knowledge. See Graham vs. John Deere Company, Commercial Clearing House, U.S. Supreme Court Bulletin, October term 1965, No. 11 decided February 21, 1966, page B672 quoting Thomas Jefferson with approval. It is difficult to imagine an area where new knowledge is more needed than in the area of smog control. We urge the Court to consider the public interest in stimulating creativity and disclosure thereof in the field of smog control. Upholding the applicant's patent will help. We cite the Court's wisdom in Bliss Company vs. Cold Metal, 47 Federal Suppl. 897 holding that there should be no summary judgment in a patent case involving an important invention if the parties have not agreed on facts and have not both moved for a summary judgment.

JUSTICE FAVORS UPHOLDING PATENT ONCE GRANTED

Induced by the protection of a patent, the appellant disclosed in his patent application his invention in sufficient detail that it could be duplicated. He made the disclosure in reliance on patent protection. To now strip him of that protection, without trial, would be an improper manipulation of

rights. He cannot now secret his creativity. The courts have often said that the presumption of validity should not be interfered with except by a thorough conviction based on evidence. Hayes vs. Brenner, No. 19711, decided February 3, 1966. U.S. Court of Appeals, District of Columbia. Zenith Radio Corporation vs. Ladd, 310F. 2d. 859 (1962).

WHEN VALIDITY IS IN ISSUE FACTS ARE IN ISSUE

The holding in Cee-Bee Chemical Company vs. Delco Chemicals CA9 263 F. 2d 150 (1958) recites the prevailing view distinguishing the fact phase from the law phase when patent validity is in issue. Of course this is important in reviewing a summary judgment. Existence or non-existence of a genuine issue of fact must be ascertained. That case states that what is prior art and what the patentee did to improve thereon are questions of fact. Whether or not this is classified as an invention is law.

The matter of "prior art" is in contention in the subject case on two sets of facts.

a. The defendants allege that appellant's device is obviously (to a skilled person) close to the Hanks patent disclosure, and,

b. that a skilled person couldn't have made the appellant's device with knowledge gained by examining his patent application as it was first filed. This sets him up for the statutory bar, a legal conclusion.

The defendants are contending that in either event, the prior art is too close to Henderson's disclosure to permit a finding of patentable invention. And furthermore, the prior art is so obviously close that no amount of evidence could tip the scales in favor of patentable invention in the mind of the Court or jury. The two factual contentions (a) and (b) supra will be treated separately in order.

THE DEGREE OF SIMILARITY OF PATENTS

SHOULD BE DECIDED ON ALL RELEVANT

EVIDENCE: NOT THE EXCLUSION OF ALL EVIDENCE

The general rule regarding factual issues in prior art applies to the specific claim of "obviousness" of a prior patent. In ruling on whether to include such matters as a "finding of fact" or "conclusion of law" the court recently opined that an issue of obviousness under 35 U.S.C. 103 is an issue of fact with a legally inferred conclusion. It may properly be called a mixture of law and fact. Stief vs. Commissioner of Patent, No. 19,361, November 18, 1965, U.S. Court of Appeals, District of Columbia Circuit, 147 U.S. Patent Quarterly 356.

To the same effect is a recent Supreme Court case on the issue of "obviousness." The opinion includes the dicta that the ultimate question of patent validity is one of law but that several basic factual inquiries are required for a finding of patent validity or invalidity. Graham vs. John Deere Company, supra.

Where a prior patent is cited as anticipation it is crystal clear that facts are in issue. It is not merely a case of construing documents. The leading case on this is Bischoff vs. Wethered, 9 Wall. (76 U.S.) 812, 19 Law Ed. 829 (1869). 1 Walker on Patents (Deller's Ed.) 294-5 quotes from the case. It seems that alleged anticipation by a prior patent depends upon the outward embodiment of the terms of the patent. The outward embodiment is sought by evidence in pais. Far more is involved than looking only within the four corners of the patents. More is involved than comparing the claims (numbered paragraphs) of the two patents. The claims must be construed in respect to the whole specification. U.S. vs. Adams CCH U.S. Sp. Ct. Bull. Current term page B709.

The following matters of evidence have been held admissible on the issue of degree of similarity of prior art. Case citations are found in 1 Walker (Deller's Ed.) page 254 et sub

What was the condition, character and progress of the art to which invention relates? Does appellant's device accomplish a result never before attempted or thought of? Is the device useful? Were experiments required before his result was arrived at? Did patentee succeed where others seeking same result had failed? Does result satisfy a long felt want? (smog control) Did appellant substitute materials that result in a new function? Did appellant change the form of the prior art involving a change

of mode of operation, or function or result? Is there a duplication of parts causing a new mode of operation or producing a new unitary result? If parts are omitted did this cause a new mode of operation of parts retained? If there are equivalent parts, does the new part perform the old function and another function by another mode of operation? Even if the device is old, is there a new and non-analogous purpose? Even though similar, is prior device incapable of functioning like the appellant's device? Did the inventor of the prior device contemplate the use of the patent in suit? Were appellant's results wholly unexpected? Are there certain valuable advantages in appellant's device? Are there disadvantages in the old device which would tend to discourage the search for new inventions?

The last three inquires are proper under the authority of U. S. vs. Adams, a companion case, to the Graham case cited above. See CCH October 1966 term bulletin page B701. These cases hold that the "non-obvious" test for patentability added by statute in 1952 has not changed case law. It has codified case law.

The Hanks patent and the Henderson patent are obviously not identical. Placing them side by side they look different and are directed to solving different problems. See pages 64 through 76 of said Transcript of Record. Hanks deals with getting power out of a quantity of gasoline; Henderson deals with controlling automotive exhaust air pollution. See the opening paragraphs in each patent. The patents not being the same or even dealing with the

same subject matter, it seems unavoidable that the Court must take evidence from appellant tending to show patentability and from the appellee tending to show lack of patentability.

At the limited hearing associated with the motion Mr. Kott and Mr. Neill testified oppositely as to the fact of anticipation of appellee's patent by the Hanks patent. The issue is genuine and material. If appellant's patent was anticipated by the Hanks patent it would have to be declared invalid and infringement could not lie. On the other hand, if the Henderson patent has not been anticipated by the Hanks patent the matter will move in the direction of inquiry into the issue of infringement.

EVIDENCE IS REQUIRED TO SHOW WHETHER OR NOT
PATENT WAS ANTICIPATED BY PRIOR USE OR SALE

The Court found that defendant General Motors commenced sale of device charged by plaintiff to infringe in September 1960. See page 17 of Transcript paragraph XII. The Court concluded that the earliest filing date accorded the patent in suit is December 5, 1961. See page 18, paragraph II thereof.

In this regard the Court is assuming that the alleged infringing device is "the invention" as the Courts have defined that term as used in 35 U.S.C. 102 (b). Several judicial opinions contain the expression "That which infringes, if later, would anticipate, if earlier." See 1 Walker on Patents 256.

This epigrammatic formula is too broad. Those who use it overlook important facts which must be resolved. These are

genuine issues of fact: that is: (a) is the patent primary or secondary? (b) how were the claims framed? (c) how should the claims be construed in the light of the alleged earlier sales?

Also, there's admittedly an issue of fact as to whether or not the earliest filing date Henderson can claim is December 5, 1961. Mr. Kotts, the Court appointed expert, stated that if there was adequate disclosure in Henderson's first application he can take the benefit of this filing date. See page 11, beginning line 4 of Reporter's Transcript. He says in other words, there is a genuine issue of fact. However, Mr. Kotts went a step further and concluded the disclosure was inadequate for one skilled in the art to make the device. This conclusion is drawn because the Examiner said he could not understand the invention. See page 12 beginning line 18 of the Reporter's Transcript.

If the application as first filed was sufficiently clear to teach others to make the device the patent would not be invalidated, whether the invention is claimed or not. 1 Walker 297, citing cases.

This meaning of "invention" denotes the part of the device the applicant claims is unique; that is, his contribution to the art. See 35 U.S.C. Chapter 11, sec. 12. Apparently the Examiner was merely unable to delineate the new from the old. This seems a reasonable interpretation and is consistent with the presumption of validity of a patent. A full trial and evidence is needed to determine if a person skilled in the art could make the

Henderson device from his disclosure as he first presented it. Nowhere in the law do we find particularly pointing out an invention to be equivalent to describing a device in sufficient detail to teach others to duplicate it.

There was no direct testimony as to the particular contents of the first Henderson application. There is Mr. Kotts' conclusion but no evidence to support it. As far as the record shows anyone could have made the Henderson device by reading his first application.

It is reasonable to assume that an application can teach a skilled engineer and also cause a patent technician to not understand the "invention," within the patent law definition of "invention."

In such event, a summary judgment should be denied. Authority therefor is Krasnow vs. Sachs, 58 Fed. Suppli. 828. There court denied summary judgment on the grounds that the record did not contain all the essential elements on which validity could be predicted. In case of any doubt, matters must be construed against the drastic remedy of summary judgment. 28 Cal Jur. 2d 666 et subseq.

CONCLUSION

For the reasons stated, it is respectfully submitted that the district court's orders granting summary judgments to both defendants be reversed, and the cause remanded with instructions to enter orders setting aside the summary judgments.

MAR 30 1966

Dated: _____

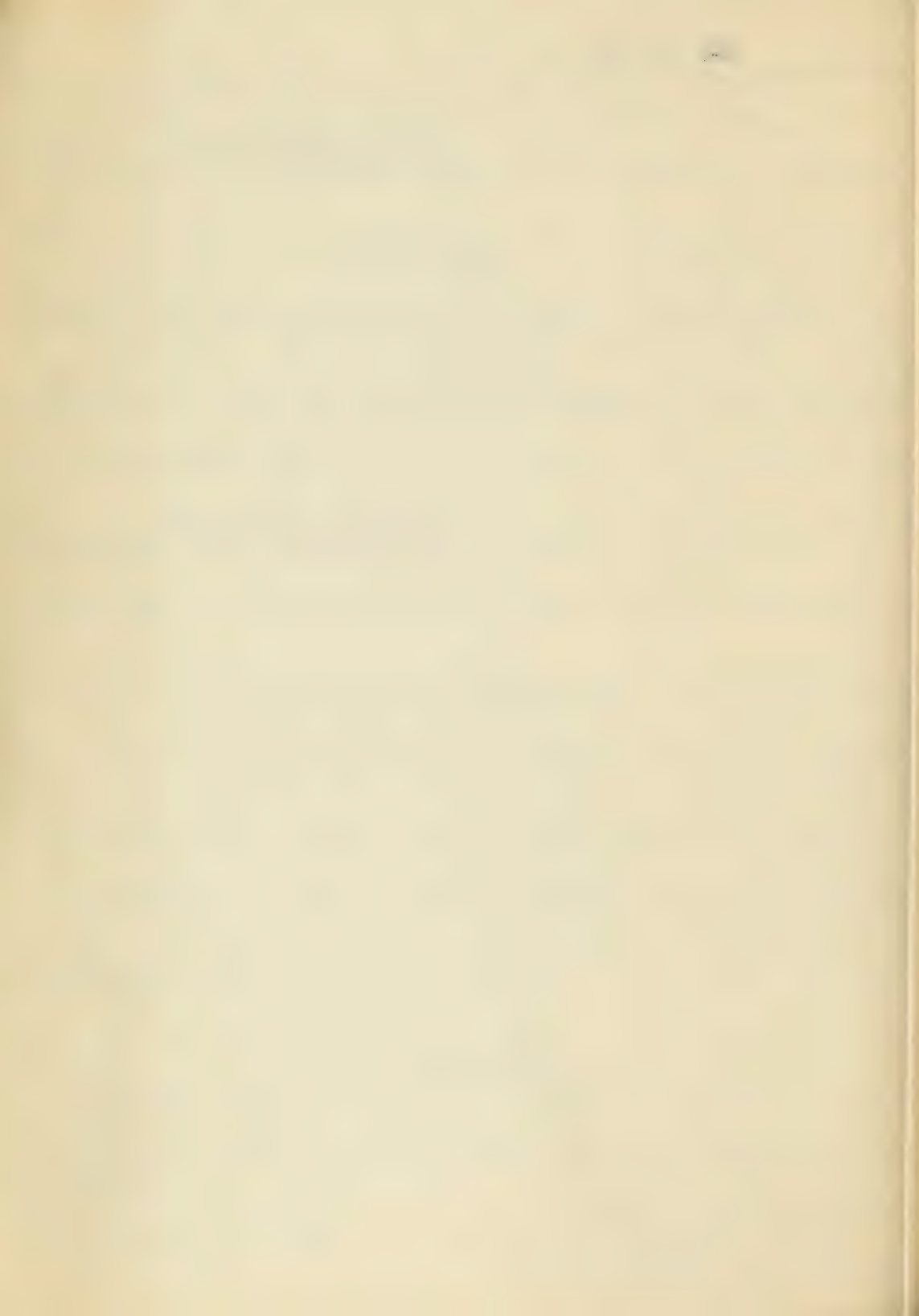


TOM SHERRARDCERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



TOM SHERRARD



No. 20740

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. A. HENDERSON,

Appellant,

vs.

A. C. SPARK PLUG DIVISION,
GENERAL MOTORS CORPORATION,

Appellee.

APPELLEE'S BRIEF

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No. 20740

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. A. HENDERSON,

Appellant,

vs.

A. C. SPARK PLUG DIVISION,
GENERAL MOTORS CORPORATION,

Appellee.

APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

To fully inform this Court as to the basis for its jurisdiction and to comply with Rule 18(b) of this Court, plaintiff-appellant's* jurisdictional statement (Appellant's Br. 1-2) should have included the following. The instant appeals arise out of two actions brought by plaintiff for patent infringement against appellees General Motors Corporation** and Ford Motor Company. These actions were based upon two amended complaints filed October 26, 1964 against defendant GM (R. 2) and against Ford (R. 41). Answers to these complaints were duly filed by each defendant (R. 5, 44). After various proceedings not material to this appeal each of the defendants filed a motion for summary judgment

* Hereinafter termed plaintiff.

** Hereinafter termed defendant GM.

(R. 30, 49). These motions were granted and on November 30, 1965, judgments of dismissal were entered as to each defendant (R. 12, 37). Findings of Fact and Conclusions of Law were entered on the same day in each action (R. 13, 81). On December 27, 1965, an order was entered granting plaintiff leave to appeal in forma pauperis (R. 34).

STATEMENT OF THE CASE

Plaintiff's statement of the case (Appellant's Br. 2-4) also fails to comply with Rule 18(c) of this Court in that it is argumentative, incomplete and inaccurate. Accordingly, defendant GM will herein set forth its own statement of the case.

A. Proceedings Below

The action is for patent infringement, plaintiff alleging in its amended complaint infringement by defendant GM of Henderson Patent No. 3,088,477, entitled "Control for Automotive Exhaust Air Pollution" which issued May 7, 1963, to plaintiff and to various other partial owners noted on the patent document (R. 64). In its answer (R. 5) defendant GM denied infringement and asserted *inter alia* that the patent was invalid on two grounds. These are (1) that the patent is anticipated by prior art and (2) that the alleged invention purported to be patented was in public use and on sale in this country more than one year prior to the filing date of the application on which the patent issued. On July 14, 1965, the District Court entered a partial summary judgment that defendant GM had not infringed claims 1 through 5 of the patent (R. 14). No appeal has been taken as to this and the

instant appeal involves only claim 6, the single remaining claim of the patent.

On October 29, 1965, defendant GM filed its motion for summary judgment that claim 6 is invalid (R. 31). This motion presented the two defenses of anticipation and prior use and sale noted above. In support of this motion, defendant GM filed a detailed affidavit by Alfred E. Majewski one of its senior project engineers (R. 20) together with a number of supporting exhibits to such affidavit.*

The matter was heard by the District Court on November 8, 1965.** In such hearing, oral testimony was given by Earl F. Kotts, who was called as the court's expert (R. 8) and John L. Neill, a witness called on behalf of appellant (R. 25).

As set forth in its Findings of Fact and Conclusions of Law (R. 13-18), the District Court sustained both the defense of anticipation and that of prior use and sale. Thus, in its Conclusions of Law the court stated that claim 6 was invalid as anticipated by the earlier Hanks Patent No. 2,354,373 (C.L. III R. 18) and invalid because the device of defendant GM which was charged to infringe claim 6 had been in public use and on sale more than one year before the filing date of the patent (C.L. IV R. 18).

* For the convenience of the Court, Exhibits AA and NN to the Majewski affidavit are included as an appendix to this brief.

** The transcript of this hearing is included in the Transcript of Record and will be referred to herein as (Nov. 8 Tr.).

The action has had one unique aspect to which this Court's attention should be drawn. As shown by the Amended Complaint (R. 2) the action was brought in *propria persona*. In order to insure that the interests of plaintiff were fully protected at all stages in the proceedings, the court of its own motion appointed an attorney Charles E. Karpinski to act on behalf of the plaintiff (Nov. 8 Tr. 3), and also appointed its own expert, Mr. Earl F. Kotts (Nov. 8 Tr. 8).

B. The Patent in Suit

The Henderson patent in suit (R. 64) is directed to a system which has long been known in the trade as a "positive crankcase ventilation system." In such a system, crankcase vapors are fed back to the intake manifold of the engine through a flow-control valve. This system differs from that most commonly used in passenger automobiles wherein crankcase vapors are permitted to escape to atmosphere through a road draft tube (F.F. III R. 14). The Henderson patent describes such a system including the normal components which have been in use for years. These are a hose or a pipe, a flow-control valve, appropriate connectors and an adaptor plate for insertion between the carburetor and the intake manifold of the engine. To this combination of usual components, the patent in suit describes the addition of an adjustable needle valve at the entrance to the intake manifold and heating means in the adaptor to heat the fed back crankcase vapors. It is the addition of the heating means that claim 6 of the patent purports to cover (F.F. IV R. 14). The combination of elements specified in claim 6 is readily apparent

in the color-coded chart comprising Exhibit AA to the Majewski affidavit (R. 20).

The patent in suit recites (R. 68) that it is a continuation-in-part of U. S. Application Serial No. 86,565.

C. The Abandoned Application

On January 25, 1961, plaintiff caused to be filed in the United States Patent Office an application for patent entitled "Control Automotive Exhaust Air Pollution". The complete File Wrapper and Contents of this application constitute Ex. No. 1 of the Record. As appears in Ex. 1, the application was rejected by the Patent Office on the ground that the disclosure contained therein was such that the Examiner could not understand it sufficiently to act on the merits (Ex. 1 p. 15-17). The application was then abandoned by plaintiff without any attempt to explain or amend it.

D. Defendant's Device

In 1959 it was discovered in the research laboratories of defendant GM that blow-by fumes from crankcases of automobiles were a substantial contributing factor to the formation of smog (R. 23). Following this discovery defendant GM developed a positive crankcase ventilation system to transmit crankcase gases to the intake manifold rather than exhaust such gases to atmosphere (R. 24). This system is shown in Majewski affidavit Exhibit AA and has been regularly and continuously manufactured, used and sold as a part of Cadillac production from September of 1960 to date (R. 27).

With one exception, the application of the elements of claim 6 of the patent in suit to defendant GM's device is also shown in Exhibit AA. This exception involves the so-called "heating means" comprising the final element of the claim. Defendant GM has denied infringement of this claim on the ground that its device does not include the required heating means and preserves this defense. For the purpose of its motion for summary judgment only, however, defendant GM has conceded that infringement exists and that the passages (color coded brown on Ex. AA) through the adaptor plate (color coded yellow) comprise the specified heating means.

E. The Prior Hanks Patent No. 2,354,373

This patent (Tr. 72) which issued in July, 1944, describes a positive crankcase ventilation system wherein crankcase gases are fed to the intake manifold. Hanks device is shown in Exhibit NN to the Majewski affidavit (Tr. 29). Also shown on this Exhibit is the application of the elements of claim 6 of the patent in suit to the Hanks structure.

F. Plaintiff's Specification of Errors

It is difficult for defendant GM to present a concise brief on this appeal because of plaintiff's failure to specify the error or errors of the court below on which it relies. Thus, on page 6 of its brief plaintiff merely asserts that the District Court erred in holding that the pleadings and testimony did not raise any genuine issue on any material fact. In this, plaintiff makes no attempt to comply with Rule 18(d) of this Court which requires an appellant to

“set out separately and particularly each error intended to be urged.”

Moreover, Rule 18(d) also provides:

“In all cases, when findings are specified as error, the specifications shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous.”

In entering its summary judgment in this case, the District Court made extensive findings of fact and conclusions of law concerning the two defenses presented. Plaintiff has not contested these findings or conclusions.

SUMMARY OF ARGUMENT

A. Prior Use and Sale

Defendant GM's accused structure was on sale and in public use more than a year prior to the filing date of plaintiff's application for patent. Claim 6 is therefore invalid under the prior public use and sale provision of Title 35 U.S.C. Section 102(b).

B. Anticipation

Claim 6 of the patent in suit is invalid as anticipated by the positive crankcase ventilation system disclosed in the earlier patent to Hanks No. 2,354,373. The claim is therefore invalid under the printed publication provision of Title 35 U.S.C. Section 102(b).

C. Absence of Genuine Issue as to Any Material Fact

There is no single fact material to either of the two defenses concerning which there is any honest dispute.

Accordingly, summary judgment was properly granted under Rule 56 of the Federal Rules of Civil Procedure.

ARGUMENT

Introduction

As previously noted, plaintiff has made no effort to comply with Rule 18 of this Court in that it has failed to separately and particularly set out each error intended to be urged. For this reason alone the judgment of the District Court should be affirmed.

Additionally, in its findings of fact and conclusions of law (R. 13-18), the court below found with respect to the defense of prior use and sale that the defendant GM commenced the manufacture and sale of devices charged by plaintiff to infringe the patent in suit in September 1960 and has continuously manufactured and sold such devices since that time (F.F. XII R. 17), that the purported invention of claim 6 of the patent in suit is not described in plaintiff's earlier application Serial No. 86,565 (F.F. VI R. 15), that the earliest filing date which can be accorded the patent in suit is December 5, 1961 (C.L. II R. 18) and that the devices charged to infringe claim 6 have been in public use and on sale more than one year before the filing date of the patent and accordingly claim 6 is invalid (C.L. IV R. 18).

As to the defense of anticipation by the Hanks patent, the court found that each of the elements of claim 6 of the patent in suit is found in the same combination in the Hanks patent which issued many years before the filing date of the patent in suit (F.F. X R. 17) and that claim 6 of the patent in suit is anticipated by Hanks and

is invalid under Title 35 U.S.C. Section 102(b), (C.L. III R. 18).

These findings and conclusions are sufficient in all respects to sustain both defenses urged by defendant GM. They have not been contested by plaintiff nor has plaintiff even suggested that they are in error. These uncontested findings and conclusions in and of themselves provide ample bases for affirming the judgment below.

Faced only with the plaintiff's general assertion that the District Court erred in holding that the pleadings and testimony did not raise any genuine issue on any material fact (Appellant's Br. 6) defendant GM can do no more in this brief than point out wherein the material facts in support of its defenses are established in the Record and the failure by plaintiff to dispute such facts.

A. Prior Use and Sale

Title 35 U.S.C. Section 102(b) reads in part:

Sec. 102. Conditions for patentability; novelty and
loss of right to patent

A person shall be entitled to a patent unless —
.

(b) the invention was . . . in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, . . .

As shown on the face of the patent (R. 68) the application for the Henderson patent in suit was filed December 5, 1961. Hence, the critical date for a statutory bar is December 5, 1960. Defendant GM through its Cadil-

lac Motor Car Division, introduced its positive crankcase ventilation system on the market in September, 1960, and has manufactured and sold the same continuously since that date. This is established by the Majewski affidavit (R. 20), particularly paragraphs (3) through (12) thereof (R. 23-27), and fully documented by Exhibits DD, EE, FF, GG, HH, II, JJ, KK, LL and MM to the Majewski affidavit.

These facts stand on the record without contradiction. Indeed, even in his brief plaintiff does not question them.*

The only argument advanced by plaintiff against the defense of statutory bar concerns plaintiff's earlier abandoned application Serial No. 86,565 which was filed January 25, 1961 (Exhibit 1). The patent in suit recites that it is a continuation-in-part of this earlier application and defendant GM concedes that if the combination covered by claim 6 of the patent in suit is adequately described in the earlier application, then the patent would be entitled to the filing date of the earlier application and the use and sale by defendant GM of its device would not be sufficiently early to invalidate the patent. Defendant submits, however, that the Record is clear to the effect that the earlier application does not contain such

* Plaintiff appears to be presenting some kind of argument on this at the bottom of page 12 of his brief wherein the statement is made that the "court is assuming that the alleged infringing device is 'the invention' . . .". If it is plaintiff's position that defendant GM's earlier sales do not invalidate claim 6 because the devices sold do not embody the invention sought to be covered by claim 6 then plaintiff's case must fail for lack of infringement. See *Anderson v. Miller et al* (U.S. 1888) 129 U.S. 70, 32 L.Ed. 635.

a disclosure and further that there is no genuine issue of fact on the point. Significantly, plaintiff makes no effort to show wherein his abandoned application does in fact contain an adequate disclosure. Indeed, he fails to take a position on or even argue the point. To the contrary he carefully states only that a trial is needed to determine the matter (Appellant's Br. 13).

A simple reading of the abandoned application demonstrates its inadequacy to support claim 6.* For example, two of the elements of the combination of claim 6 are:

“a pipe connecting said inlet port with said crankcase to conduct crank case vapors into said opening;

“a flow control valve in said pipe operable by engine induced vacuum to control flow of crankcase vapors according to engine speed”

As shown on Exhibit AA to the Majewski affidavit (R. 20) the specified flow-control valve in the patent in suit is the valve generally indicated by the numeral 16 in Figs. 1 and 2 of the patent which is color coded orange. Referring to the abandoned application and particularly line 17 of page No. 2 of the File Wrapper (Ex. 1), the text specifies:

“14, 14A, 14C is a connection on unit to allow the crankcase breather line to be attached.”

* The sufficiency of a disclosure in a patent application is a question of law. *Minnesota Mining and Mfg. Co. v. Carborundum Co.* (C.A. 3, 1946) 155 F.2d 746, and the construction of the specification and claims is proper on summary judgment. *Milcor Steel Co. v. George A. Fuller Co.* (U.S. 1941) 316 U.S. 143, 86 L.Ed. 1332; *Riley v. Broadway-Hale Stores* (C.A. 9, 1954) 217 F.2d 530; *Bulldog Electric Products Co. v. Cole Electric Products Co.* (C.A. 2, 1945) 148 F.2d 792.

Fig. 1 of the abandoned application (File Wrapper p. 6) shows merely a hose or pipe connected to the element labeled 14. Nowhere is there described or illustrated the flow-control valve required by the claim. To support a claim, the specification must of course describe each of the elements of the claim. *Schriber-Schroth Co. v. Cleveland Trust Co.* (U.S. 1938) 305 U.S. 47, 83 L.Ed. 34.

A further deficiency in the abandoned application is apparent on its face. Thus, the specification borders upon incoherency and it is impossible to ascertain just what the applicant had in mind. In this he failed to present to the Patent Office such an understandable description of his invention as would entitle him to the benefit of his earlier filing date. The legal requirement is set forth in the following language of the Court of Customs and Patent Appeals in *Application of Moreton* (1963) 312 F.2d 954 at 957:

“Our decision as to whether the board was correct in finding that the claimed invention was not entitled to the benefit of the filing date of appellant’s application Serial No. 28,521 requires a careful analysis of that earlier application as a whole to see what invention is disclosed therein. 35 U.S.C. Sec. 120 states that ‘An application for patent for an *invention* disclosed . . . in an application previously filed in the United States by the same inventor shall have the same effect, *as to such invention*, as though filed on the date of the prior application, . . .’ [Emphasis ours.] If appellant’s invention as claimed in the appealed claims is not disclosed in Serial No. 28,521 he is obviously not entitled to the filing date of that application for the appealed claims.”

The required disclosure is, of course, statutory. Title 35 U.S.C. Section 112 provides:

“The specification shall contain a written description of the invention in such full, clear, concise and exact terms as to enable any person skilled in the art . . . to make and use the same . . . ”

This statutory requirement has not been met. Indeed, the application was rejected by the Patent Office for the precise reason that the disclosure was of such nature that it could not be understood. Thus, at the top of page 16 of the File Wrapper (Exhibit 1) the Patent Office Examiner stated:

“Applicant’s disclosure is such that it cannot be sufficiently understood to enable the examiner to act on the merits.”

The Examiner then proceeded to point out certain physical impossibilities, omissions of necessary description and inconsistencies appearing in the description. On page 17, the following statement appears:

“Claims 1 to 7 are rejected as failing to define the invention since the device is not understood as explained above.”

As shown in the File Wrapper, plaintiff made no effort to contest the Patent Office Examiner in this regard. He presented no arguments nor did he attempt to explain the deficiencies noted. To the contrary, he simply acquiesced in the ruling of the Patent Office and permitted the application to become abandoned.

Mr. Kotts, the court appointed expert, agreed with the position taken by the Patent Office Examiner (Nov. 8 Tr. 12).*

Were there any doubt in the matter, and defendant GM submits that there is not, it would be resolved by the concession by plaintiff made in open court in the course of the November 8 hearing. Thus, the plaintiff, Mr. Henderson, stated:

“According to Congressman Trimble, who originally filed the application that the Commissioner did not understand for my protection while I was in the hospital, *we were aware that the patent was not put together so the Commissioner would understand it.* We were working on the basis that if you filed, you have a six month period to protect your right. (Emphasis added)” (Nov 8 Tr. 19-20).

Summarizing the above, the abandoned application is deficient because it does not include any description or reference to a flow-control valve required by claim 6 of the patent in suit. Further, the application fails to include an adequate description as required by statute. As to this, the Patent Office rejected the application on the ground that it could not be understood. Plaintiff acquiesced in this rejection and permitted the application to become abandoned. Finally, plaintiff has conceded

* It is defendant GM's position that a consideration of the oral testimony given at the November 8 hearing is unnecessary on this appeal because the two defenses involved are conclusively established by the documentary proofs of Record. Occasional reference will, however, be made to such testimony because it has been relied upon by plaintiff in his brief.

his awareness that the application as filed was not expected to be understood.

On page 13 of his brief plaintiff makes the remarkable statement that there is “admittedly an issue of fact” on the question. He reaches this conclusion from the statement of Mr. Kotts that if there was an adequate disclosure in plaintiff’s abandoned application he is entitled to the benefit of its filing date. This is merely a general statement of the law with which the defendant GM has no quarrel. It most certainly does not, however, spell out any *issue of fact* nor has plaintiff suggested what this issue might be.

A review of the Record demonstrates that plaintiff has never made any attempt whatever to show that there was any factual dispute or issue concerning the insufficiency of the disclosure in his abandoned application. To the contrary, as pointed out above, he conceded such insufficiency.

In its motion for summary judgment defendant GM urged that claim 6 was invalid because the alleged invention sought to be covered thereby was in public use and on sale in this country more than one year prior to the date of the application for the patent (R. 31). The evidence establishing this public use and sale is set forth in detail in the affidavit of Majewski and the exhibits attached thereto filed with defendant GM’s motion (R. 20). Plaintiff filed no counter affidavits or memorandum. Plaintiff did not argue in the court below that he was entitled to the filing date of his abandoned application nor did he at any time even suggest that his abandoned application contained a sufficient disclosure. To the contrary, plaintiff’s attorney merely suggested to the court

that it was faced with the factual determination as to whether the application for the patent was or was not a proper continuation-in-part of the abandoned application (Nov. 8 Tr. 50). He made no attempt to point out nor did he suggest that there was a factual *dispute* in the matter. Plaintiff's witness Neill was given a copy of the abandoned application by the court (Nov. 8 Tr. 24). Although questioned at length by plaintiff's counsel on the question of anticipation by the Hanks patent, Neill was not even asked about the sufficiency of the disclosure of the application.

In the brief filed by plaintiff in this Court no attempt has been made to show that plaintiff's abandoned application contains a description of the elements required by claim 6 of the patent in suit. Nor is any argument advanced to show that the description in the application is sufficiently understandable to comply with the statutory requirements.

No dispute or issue has been presented as to any fact material to the question of the insufficiency of the description in plaintiff's abandoned application. Plaintiff's suggestion, and it is no more than that, that there *might* be such an issue cannot fill this void. Accordingly, there is no material issue of fact concerning the defense of prior use and sale and the judgment should be affirmed on this ground.

B. Anticipation by the Hanks Patent

Title 35 U.S.C. Section 102 reads in part:

Sec. 102. Conditions for patentability; novelty
and loss of right to patent

A person shall be entitled to a patent unless —
.

(b) the invention was patented or described in a printed publication in this or a foreign country . . . more than one year prior to the date of the application for patent in the United States, . . .

Each of the elements of claim 6 of the patent in suit is found in the earlier Hanks patent. The claim is therefore invalid as anticipated. As stated in *William Carlton, et al v. Howard Bokee* (U.S. 1872) 84 U.S. 463, 21 L.Ed. 517,519:

“Everything here claimed is found in (a prior device) . . . It follows that this claim is void for this reason, without reference to the other objections which have been suggested in relation to it.”

See also *Stallman v. Casey Bearing Company* (C.A. 9, 1957) 244 F.2d 905.

Hanks Patent No. 2,354,373 (R. 72-76) is described in detail in the Majewski affidavit (R. 20) and also in the affidavit of John J. Roethel submitted on behalf of defendant Ford Motor Company (R. 78). These affiants were in agreement that the Hanks patent anticipates claim 6 of the Henderson patent in suit in that each of the elements included in claim 6 is found in the Hanks patent. This anticipation is clearly shown in the color-coded chart appearing as Exhibit NN to the Majewski affidavit. In this chart, claim 6 is dissected into its several elements and the presence of each element in the device in the Hanks patent is shown.

Mr. Kotts, the court appointed expert, agreed in full with the affiants Majewski and Roethel. Thus, Mr. Kotts

testified that all of the elements of Henderson claim 6 are present in the Hanks patent and that the Henderson patent was therefore invalid as anticipated (Nov. 8 Tr. 8). Mr. Kotts further testified:

“THE COURT: Is this, in your opinion, fairly clear from the reading of the Hanks patent and the Henderson patent?

“MR. KOTTS: Yes, it is.

“THE COURT: Anything complicated about it that would require the testimony of any expert on the matter?

“MR. KOTTS: I don't think so. I think the devices are simple enough that you can compare the documents on the basis of anticipation and find Hanks a valid anticipation. (Nov. 8 Tr. 14-15)”

Thus, three experts have reviewed the Hanks patent and are in agreement that it anticipates claim 6 of the patent in suit. Moreover, one of these, a completely unbiased expert, has testified that the devices are simple, that the anticipation appears from a comparison of the documents, and that there is nothing complicated about the matter that would require the testimony of an expert.

While plaintiff argues that issues of fact are involved, he has filed no counter affidavits to establish any dispute as to the basic facts upon which this defense of anticipation is based, nor, as noted above, has he contested any of the court's findings of fact or conclusions of law regarding anticipation.

Disregarding plaintiff's rather lengthy argument in his brief as to the factual questions which can arise in

patent infringement actions on the issue of obviousness* plaintiff's brief contains only three direct references to the question of anticipation by Hanks. First plaintiff makes the general statement that Mr. Neill, plaintiff's expert, testified as to numerous factual distinctions between the Hanks patent and the Henderson patent (Appellant's Br. 3). In support of this plaintiff simply cites pages 25 to 50 of the November 8 transcript which includes the entire testimony given by Neill and does not aid in an identification of the "factual distinctions" which plaintiff has in mind.

As to this, plaintiff gives one specific reference to page 46, lines 11 and 12 of the transcript (Appellant's Br. 3) with the statement that at least as to one feature the Henderson device was described as exactly opposite that of the Hanks device. The matter involved is in no way material. Neill testified that the Hanks flow-control valve operated in the opposite manner to that of Henderson (Nov. 8 Tr. 46). While Neill was incorrect in this statement, the matter is of no moment. Claim 6 simply calls for a flow-control valve operable by engine induced vacuum. It does not require that the valve operate in any particular direction or manner. Thus, the "issue" suggested by plaintiff is not a material one. Similarly, but in more general terms, plaintiff argues that there are differences between the device described in the patent in suit and that of the Hanks patent. Any such differences are, of course, immaterial as to the validity of claim 6 unless these differences are set forth in the claim. See *Winslow*

* An issue which was not considered by the court below and which is not before this Court in the instant appeal.

Engineering Company v. Smith (C.A. 9, 1955) 223 F.2d 438 (adhered to on rehearing, 228 F.2d 332).

Next, plaintiff states (Appellant's Br. 3) that Mr. Henderson gave direct testimony on the factual differences between his device and the earlier Hanks device and refers to page 22, lines 15 through 25 of the November 8 transcript. Plaintiff's characterization of this portion of the Record as "direct testimony" is very misleading. Mr. Henderson had not been sworn as a witness nor was he on the stand. To the contrary, the court had simply asked Mr. Henderson if he had any questions to put to Mr. Kotts the court's expert who was then on the stand (Nov. 8 Tr. 19). Rather than questioning Kotts, Mr. Henderson proceeded simply to argue his cause. This fact was noted by the court (Nov. 8 Tr. 24).

The full statement referred to, commencing on page 21 and continuing through page 24 of the transcript, shows that what Mr. Henderson was really arguing was that his device differed from Hanks in that he utilized a catalyst and screens and that these elements were not shown by Hanks. Both the court and Kotts pointed out to him that claim 6 contains no reference to either screens or a catalyst and therefore his argument had no relevancy on the question of anticipation.

Finally, plaintiff makes the general and unsupported statement that Kotts and Neill testified oppositely as to the fact of anticipation and that the issue is genuine and material (Appellant's Br. 12). This statement does not aid this Court or defendant GM as to just what material factual issue is in dispute.

Because of plaintiff's failure to indicate those portions of Neill's testimony on which it relies, or to specify the particular material facts which it contends are in dispute, defendant GM will herein review what it considers to be the more significant portions of Neill's testimony and will point out wherein the same fails to raise any real issues of material fact.

At the outset it should be noted that Neill was a biased witness as his name appears as one of the assignees of a partial interest in the patent in suit (R. 68). Nowhere does it appear that he has had any experience in the field of automobile engine systems and his qualifications as an expert in the field of the patent in suit are highly questionable. He testified at length on the question of anticipation yet admitted that he was only "slightly familiar" with the Hanks patent (Nov. 8 Tr. 34). He further conceded that he was not an expert and could not interpret the Hanks patent (Nov. 8 Tr. 42). On cross examination Neill was exceedingly argumentative and evasive to the point where the court had to admonish him either to answer the questions put to him or get down off the witness stand (Nov. 8 Tr. 47).

In substance, Neill testified that two of the elements of claim 6 of the patent in suit are not disclosed in the Hanks patent. These elements are a pipe connecting the inlet port with the crankcase and a flow-control valve in this pipe (Nov. 8 Tr. 38). In support of his position as to the first element, the witness argued that Hanks described his pipe as connecting to the oil sump rather than the crankcase. This argument is specious inasmuch as the oil sump of an engine is located at the bottom of the crankcase. Neill admitted that Hanks teaches the re-

covery of vapors, not oil (Nov. 8 Tr. 42), and finally conceded:

“Whether you want to call a sump a crankcase or whether you want to say a pan, that the pan on the engine of an automobile is a crankcase is a matter of conjecture.” (Nov. 8 Tr. 41).

As to the presence or absence of a flow-control valve in the Hanks patent, after considerable evasion Neill ultimately admitted on cross examination that this element was described in the Hanks patent (Nov. 8 Tr. 47).

Thus, the sum total of plaintiff's attempt to show material issues of fact regarding the defense of anticipation by Hanks consisted of the biased testimony of a witness of questionable qualification who admitted he was only slightly familiar with the Hanks patent, could not interpret it and finally on cross examination reversed the position he had taken on direct and in substance admitted that all of the elements of claim 6 of the patent in suit are described in the Hanks patent.

C. The Absence of an Issue of Material Fact

As noted above, plaintiff has done no more in his brief than assert that issues of fact exist. He has made no real effort to identify the issues or to indicate any evidence he is prepared to introduce which might tend to disprove any of the material facts established by defendant GM. This is not enough to defeat a motion for summary judgment. As stated in *3 Barron and Holtzoff Federal Practice and Procedure* 141:

“On the other hand, the whole purpose of the summary judgment procedure would be defeated if

a case could be forced to trial by a mere assertion that an issue exists, without any showing of evidence.”

This rule has frequently been recognized by this Court in upholding the granting of motions for summary judgment because of the failure of the opposing party to establish on the record that a genuine issue of material fact exists. See for example *Englehard Industries, Inc. v. Research Instrumental Corp.* (C.A. 9, 1963) 324 F.2d 347 wherein the only thing in the record opposing the showing of the moving party were affidavits containing only hearsay and legal conclusions. See also *Rankin v. King* (C.A. 9, 1959) 272 F.2d 254; *Gifford v. Travelers Protective Ass'n of America* (C.A. 9, 1946) 153 F.2d 209; *Leishman v. Radio Condenser Co.* (C.A. 9, 1948) 167 F.2d 890; *Bruce Construction Corporation v. United States* (C.A. 5, 1957) 242 F.2d 873.

As an apparent substitute for his failure to make any showing of any honest dispute as to any material fact, plaintiff relies upon two “strong presumptions” which he argues should be applied in his favor (Appellant’s Br. 6). The first of these presumptions is that the patent in suit is valid. The short answer to this is that neither the earlier device of defendant GM on which the defense of public use and sale is based nor the earlier Hanks patent on which the defense of anticipation is based was before the Patent Office in the course of the prosecution of the patent in suit. As stated by this Court in *Jaybee Mfg. Corp. v. Ajax Hardware Mfg. Corp.* (C.A. 9, 1961) 287 F.2d 228, 229:

“When the most pertinent art has not been brought to the attention of the administrative body the presumption is largely dissipated.”

The second presumption urged by plaintiff is the “presumption against a summary judgment.” The answer to this is simply that there is no such presumption. As stated in *3 Barron and Holtzoff Federal Practice and Procedure* 149:

“The rationale of these cases seems to be that the moving party has the burden of showing that there is no genuine issue as to a material fact and that he is entitled to judgment as a matter of law, but that when he has made a prima facie showing to this effect the opposing party cannot defeat a motion for summary judgment and require a trial by a bare contention that an issue of fact exists. He must show that evidence is available which would justify a trial of the issue.”

Next, plaintiff appears to argue that it is improper for a court to construe a patent specification or its claims in determining a motion for summary judgment involving the validity of a patent. This is simply not the law. See for example *Milcor Steel Co. v. George A. Fuller Co.* (U.S. 1941) 316 U.S. 143, 86 L.Ed. 1332; *Rankin v. King* (C.A. 9, 1959) 272 F.2d 254; *Bulldog Electric Products Co. v. Cole Electric Products Co.* (C.A. 2, 1945) 148 F.2d 792. See also *Englehard Industries, Inc. v. Research Instrumental Corp.* (C.A. 9, 1963) 324 F.2d 347 wherein this Court upheld a summary judgment based on a lack of infringement the determination of

which required construction and interpretation of the patent involved.

Plaintiff relies upon this Court's decision in *Cee-Bee Chemical Co. v. Delco Chemicals* (C.A. 9, 1959) 263 F.2d 150. In that case the Court simply reversed a summary judgment of invalidity for the reason that the record showed the presence of a direct dispute as to a material fact. No such dispute appears in the Record of the instant case.

On pages 9 through 12 of his brief plaintiff cites several authorities and argues at length concerning various factual issues which may arise in patent cases involving the question of "obviousness" under Title 35 U.S.C. Section 103. In this, plaintiff misconstrues the nature of the two defenses sustained below which are not based upon Section 103 but rather upon Section 102(b). Whether or not plaintiff's purported invention was "obvious" is not before the Court on this appeal.

Similarly, plaintiff's arguments as to "Public Policy" and "Justice" (Appellant's Br. 7, 8) are not pertinent. Claim 6 is invalid under the unequivocal language of Section 102(b).

CONCLUSION

Claim 6 of the patent in suit is invalid because defendant GM's accused devices were sold more than a year prior to the filing of plaintiff's application. Claim 6 is also invalid because it is anticipated by the prior Hanks patent. There is no genuine issue of any material fact upon which these two defenses are based. The judgment of the court below should be affirmed.

Respectfully submitted,

LYON & LYON

By RICHARD E. LYON

Attorneys for Appellee

Of Counsel:

J. L. CARPENTER

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD E. LYON

EXHIBIT AA
TO
MAJEWSKI AFFIDAVIT

**EXHIBIT AA
TO
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May 7, 1963

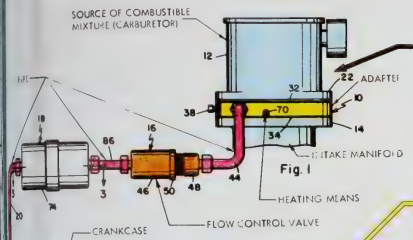
R. A. HENDERSON

3,088,447

HENDERSON CLAIM 6

GENERAL MOTORS CRANKCASE VENTILATION SYSTEM

Filed Dec. 5, 1961



IN COMBINATION WITH AN INTERNAL COMBUSTION ENGINE HAVING A CRANKCASE, A SOURCE OF COMBUSTIBLE MIXTURE AND AN INTAKE MANIFOLD TO SUPPLY THE MIXTURE TO THE ENGINE;

MEANS FOR REDUCING THE AIR POLLUTANT PRODUCTS OF THE ENGINE, COMPRISING:

AN ADAPTER MOUNTED BETWEEN SAID SOURCE OF COMBUSTIBLE MIXTURE AND SAID INTAKE MANIFOLD AND HAVING

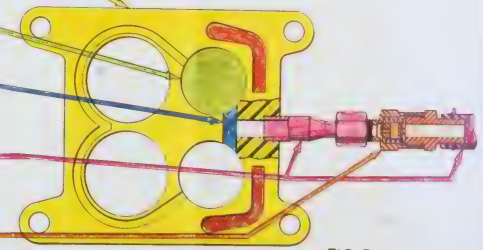
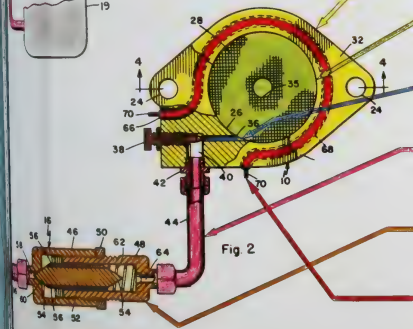
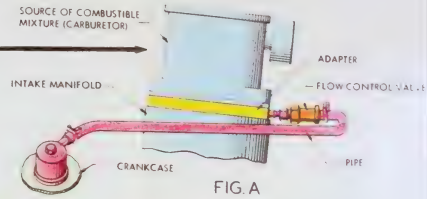
AN OPENING THROUGH WHICH THE COMBUSTIBLE MIXTURE PASSES;

AN INLET PORT IN SAID OPENING;

A PIPE CONNECTING SAID INLET PORT WITH SAID CRANKCASE TO CONDUCT CRANKCASE VAPORS INTO SAID OPENING;

A FLOW CONTROL VALVE IN SAID PIPE OPERABLE BY ENGINE INDUCED VACUUM TO CONTROL FLOW OF CRANKCASE VAPORS ACCORDING TO ENGINE SPEED AND

HEATING MEANS IN SAID ADAPTER ADJACENT SAID OPENING.



NOT PRESENT

IN THE
United States Court of Appeals
for the Ninth Circuit

R. A. HENDERSON,

Plaintiff - Appellant,

VS.

FORD MOTOR COMPANY,

Defendant - Appellee.

APPELLEE FORD MOTOR COMPANY'S BRIEF

FEB 14 1967

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Ford Motor Company

FILED

MAY 2 1966

WM. B. LUCK, CLERK

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IN THE
United States Court of Appeals
for the Ninth Circuit

R. A. HENDERSON,

Plaintiff - Appellant,

vs.

FORD MOTOR COMPANY,

Defendant - Appellee.

APPELLEE FORD MOTOR COMPANY'S BRIEF

JURISDICTION

The jurisdiction is correctly set forth in Appellant's Brief.

COUNTER-STATEMENT OF THE CASE

A. The Issue Of This Appeal

Defendant Ford Motor Company moved the Court for a Summary Judgment that Claim 6 of R. A. Henderson Patent No. 3,088,447 is invalid as being anticipated by U. S. Patent No. 2,354,373 issued July

25, 1944 to Lincoln Hanks under the provisions of 35 U.S.C. 102(b) :

“A person shall be entitled to a patent unless —

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States.”

Defendant Ford Motor Company's Motion for Summary Judgment was not concerned with 35 U.S.C. 103 and accordingly none of the remarks directed to “obviousness” appearing in the BRIEF FOR APPELANT are in any way applicable to the decision of the District Court in connection with this appeal.

B. Henderson Patent No. 3,088,447 In Suit

Referring to the reproductions of Figs. 1 and 2 of the Henderson patent reproduced at Appendix Page 1 to this brief, the Henderson device is adapted to conduct crankcase vapors and air pollutants from the crankcase 19 of an internal combustion engine to the intake manifold for intermixture with the fuel and air mixture from the carburetor for combustion in the cylinders in an effort to reduce harmful exhaust gas pollutants.

The Henderson device includes a pickup pipe 20 that extends from the engine crankcase 19 to an oil separator 18. The latter is connected to valve 16 by conduit 86. Valve 16 includes a slidable element 52 that is biased towards a closed position by a spring 62. From the valve 16 another pipe 44 extends to a plate-like adapter 10 that fits between the carburetor

12 and the intake manifold 14. This adapter includes grids or screens 28 and an electric resistant heating element 66 for heating the fuel and air mixture from the carburetor and the vapors from the engine crankcase 19. The adapter 10 is formed at one side with an inlet port 36 fitted with an adjustable needle valve 38 that controls flow through the pipe 16 into the adapter.

In the operation of the Henderson device, when the engine is running vapors from the engine crankcase pass through pickup pipe 20, oil separator 18, pipe 86, valve 16, pipe 44 and adapter inlet port 36 into the adapter. Control over the flow of such vapor is by means of the valve 16 and adjustment needle 38, with the extent of opening of valve 16 being determined by the magnitude of the intake manifold pressure. Crankcase vapors entering the adapter will be drawn into the intake manifold together with fuel vapor from the carburetor 12. The electric heating element 66 is said to vaporize the gases flowing through the adapter 10 so as to produce more efficient combustion thereof within the engine.

Claim 6 of the Henderson patent in suit which was held invalid by the District Court is set forth immediately herebelow in divisible parts.

(6) In combination with an internal combustion engine having a crankcase, a source of combustible mixture and an intake manifold to supply the mixture to the engine; means for reducing the air pollutant products of the engine, comprising:

an adapter mounted between said source of combustible mixture and said intake mani-

- fold and having an opening through which the combustible mixture passes;
- an inlet port in said opening;
- a pipe connecting said inlet port with said crankcase to conduct crankcase vapors into said opening;
- a flow control valve in said pipe operable by engine induced vacuum to control flow of crankcase vapors according to engine speed;
- and
- heating means in said adapter adjacent said opening.

C. Lincoln Hanks Patent No. 2,354,373

Referring to Figs. 1 and 3 of the Hanks patent reproduced at Appendix Page 2, the District Court held in Finding 8 that the disclosure of the Hanks patent and its structural relationship to Henderson Claim 6 is as follows:

United States Letters Patent No. 2,354,373 issued July 25, 1944 to Lincoln Hanks discloses an automobile engine fuel mixing device that includes a hollow spacer or mixing chamber 8 which is mounted between the carburetor 6 and the intake manifold of the engine. This mixing chamber 8 is formed with a central, vertical opening 22, 23 and 24 through which the combustible mixture from the carburetor passes downwardly into the intake manifold. This mixing chamber 8 therefore corresponds exactly to the element "an adapter mounted between said source of combustible mixture and said intake manifold and having an opening through which

the combustible mixture passes" recited in Henderson Claim 6. The mixing chamber 8 of Hanks is formed at its upper right-hand portion (Fig. 3) with an inlet port (not numbered) that receives a pipe length 39, with such inlet port of Hanks corresponding exactly to the "an inlet port in said opening" element of Henderson Claim 6. Hanks also includes pipe lengths 39 and 33 which connect the aforementioned inlet port with the engine crankcase to conduct crankcase vapors into the opening 22, 23 and 24 of the mixing chamber 8. Thus, pipe lengths 39 and 33 correspond exactly with "a pipe connecting said inlet port with said crankcase to conduct crankcase vapors into said opening" element of Henderson Claim 6. Interposed between the pipe lengths 39 and 33 of Hanks is a spring-biased valve 34 that is operable responsive to the intake manifold pressure of the engine so as to control flow of crankcase vapors through pipe lengths 39 and 33 into the opening 22, 23 and 24. This valve 34 of Hanks therefore corresponds exactly with the "a flow control valve in said pipe operable by engine induced vacuum to control flow of crankcase vapors according to engine speed" element of Henderson Claim 6. Finally, Hanks conducts exhaust gases from the engine through a pipe 19 into an outer heat exchange jacket defined by walls 31 of mixing chamber 8, such exhaust gases discharging through pipe 20. This arrangement effects heating of the mixing chamber walls 28 that define the midportion of the opening 22, 23 and 24 of Hanks' member 8. Accordingly, Hanks clearly discloses the "heating means in said adapter adjacent said opening" element of Henderson Claim 6.

It is not controverted that the Hanks patent was not cited by the Patent Office during the prosecution of the

Henderson patent in suit. This fact is set forth in Finding X.

D. How The Facts Were Brought To The Attention Of The District Court.

The teaching of the Henderson patent in suit and the disclosure of the Hanks patent and its relation to Claim 6 of the Henderson patent in suit were brought to the attention of the District Court by means of true copies of the Henderson and the Hanks patents, the AFFIDAVIT OF JOHN J. ROETHEL IN SUPPORT OF DEFENDANT FORD MOTOR COMPANY MOTION FOR SUMMARY JUDGMENT (TRANSCRIPT OF RECORD Page 78) and testimony adduced at the hearing on the Motions for Summary Judgment of both Ford Motor Company and General Motors Corporation November 8, 1965.

E. Appellant's Alleged Specification Of Error

And The Question Presented By This Appeal — As Set Forth In The Brief For Appellant.

Specification Of Error

The District Court erred in holding that the pleadings and testimony did not raise any genuine issue on any material fact.

Question Presented

Does the expediency of a dismissal summarily given outweigh the patent purpose of an important invention (smog control device) where the parties do not agree on facts pertinent to the alleged anticipation?

SUMMARY OF ARGUMENT

A. The Question Presented By This Appeal Has Previously Been Answered In The Affirmative By This Court.

B. The Presumption Of Patent Validity Relied Upon By Appellant Does Not Apply.

C. There Is No Presumption Against Summary Judgment Where There Are No Genuine Issues Of Fact.

D. The Facts Which Appellant Urges Require Consideration Have No Relevancy To Anticipation Of The Henderson Patent In Suit By The Prior Art Hanks Patent.

ARGUMENT

A. The Question Presented By This Appeal Has Previously Been Answered In The Affirmative By This Court.

Appellant herein questions whether or not it is proper in a patent infringement case to grant a Motion for Summary Judgment invalidating a patent for anticipation unless plaintiff and defendant agree on the facts pertaining to such anticipation. This question has already been answered in the affirmative by this Court in *Rankin et al v. King et al* decided November 12, 1959; 272 F. 2d 254.

In the *Rankin* case the District Court granted a Motion for Summary Judgment holding the patent there in suit invalid as lacking invention over a prior art patent. In opposing the motion, plaintiffs relied upon affidavits alleging questions of fact existed and affidavits differing in interpretation and reading of the prior art patent. Under those circumstances this Court held that the mere presence of such counter-affidavits were of no consequence if the Court chose not to consider such disputed facts in rendering the Motion for Summary Judgment and instead rendered its judgment as a matter of law from the undisputed facts disclosed by the patent in suit and the prior art patent. The *Rankin* case is substantially on all fours with the present case as indicated by the following language from *Rankin*:

“The mere presence of affidavits alleging questions of fact existed, or differing in interpretation and reading of the patent and various prior art, whether cited or non-cited, is of no consequence if the court did not consider such

disputed facts. Here he specifically declined to consider such affidavits, but considered only the patent in suit, the alleged infringing product, the prior art cited in the file wrapper, and the non-cited prior art. The authenticity of the various patents (Exhibits A to I, inclusive) and of the sole physical Exhibit (Exhibit L) were unquestioned.

Thus unless the court needed expert help in reading the patent, it appeared clearly as a matter of law from the undisputed facts disclosed by the letters and the file wrapper of patent No. 2,366,986 and the prior art patents both cited and non-cited, that the patent in suit was invalid because of want of patentable novelty.⁶ The motion for summary judgment was therefore properly granted.⁷

Appellants ask us to rule, relying on *Adams v. Columbus Manufacturing Co.*, M. D., Ga., 1958, 169 F. Supp. 346, 120 USPQ 75, that a summary judgment *cannot* be granted where affidavits contradictory in nature have been filed. This we cannot do. In *Adams*, supra, the trial court was asked to consider such affidavits. The court refused. It did not say it *could* not grant summary judgment, but that 'it must indeed be a rare patent case which can be thus summarily truncated.' The language of that case limits the rule to what the court should 'ordinarily' do. With that qualification we agree. And we will agree that it is 'usually inappropriate' to grant summary judgment in the ordinary patent case. *Baker v. First Nat. Stores*, D. Mass., 1946, 64 F. Supp. 979, 980, 69 USPQ 11, 12."

Applying the above set-forth language to the facts in the present case, appellant herein seeks to create genuine issues of material fact solely by means of contradictory

testimony adduced by Messrs. Henderson and Neil at the hearing of November 8, 1965 on the Motions for Summary Judgment. Under the rationale of the *Rankin* case the District Court in the present case was not obliged to consider such testimony if it appeared as a matter of law from undisputed facts disclosed by the Henderson patent in suit and the prior art Hanks patent that the Henderson patent is invalid. The Findings made by the District Court herein clearly demonstrate that the undisputed facts disclosed by the Henderson and Hanks patents led the District Court to conclude the Henderson patent to be invalid as anticipated by the Hanks patent. Hence it was not necessary for the District Court to consider any so-called disputed facts presented by appellant. The question presented by this appeal should therefor be answered in the affirmative here just as it was in the *Rankin* case.

The question raised by appellant herein was also answered in the affirmative by the Fifth Circuit Court of Appeals in *Ronel Corp. v. Anchor Lock* decided December 20, 1963; 325 F. 2d 889. In the *Ronel* case the defendant filed a Motion for Summary Judgment supported by an Affidavit of a patent attorney establishing anticipation of the patent in suit by a prior art patent. Plaintiff filed several counter-affidavits and upon the District Court granting defendant's Motion for Summary Judgment appellant appealed contending that there were genuine issues of fact requiring a full trial. The Fifth Circuit Court of Appeals affirmed the District Court holding:

“It is apparent to us that the trial court could, by observation of the two devices, readily arrive at the conclusion reached by it. The court could

not be aided by the affidavits of any number of experts pro or con in reaching this conclusion. This, therefore, presented such a situation as was under consideration by the Court of Appeals for the Sixth Circuit in the Bobertz case, *supra*, in which the Court said, 107 USPQ at 342:

“Where no factual issues are present and where the patents and products involved are sufficiently simple to make expert testimony unnecessary, disposition under rule 56 is proper.”

The question of appellant Henderson herein has also been answered in the affirmative by the Seventh Circuit Court of Appeals in *A.R. Inc. v. Electro-Voice, Inc.* decided December 28, 1962; 311 F. 2d 508. In the *A.R.* case the defendant attempted to raise a genuine issue of fact by means of deposition and affidavits. The Seventh Circuit Court of Appeals upheld the District Court's granting of the motion and the following language from the decision is particularly in point with respect to the case at issue here:

“The issue presented by the defendant's motion for summary judgment, and resolved favorably to the defendant by the District Court, is whether the plaintiff's patent is valid over the prior art. It concerns, as above indicated, the showing made by the prior art before Villechur produced his alleged invention, the nature of the improvement the patentee has made over the prior art, and the final step of resolving whether the difference over the prior art disclosures is properly classifiable as ‘invention.’ *Armour & Co. v. Wilson & Co., Inc.*, 7 Cir., 274 F.2d 143, 156, 124 USPQ 115, 125. The prior art relied upon here is documentary in form. It did not stand mute but spoke for itself. *Armour & Co. v. Wilson & Co.*, *supra*. And, we do not find anything in

the deposition testimony of Villchur or his affidavit, accepting it as we do as the testimony of a qualified expert in the field, which precipitates a genuine factual issue material to the resolution of the ultimate issue presented by defendant's motion. The situation here is analogous to that presented in *Davison Chemical Corp. v. Joliet Chemicals, Inc.*, 7 Cir., 179 F2d 793 84 USPQ 325, in which this court recognized that a suit concerning the validity of a patent over the prior art is not immune from disposition on motion for summary judgment even though, in addition to prior art patents, deposition testimony of the applicant and affidavits are involved, if no genuine issue of material fact is present. And see: *Magee v. Coca-Cola Company*, 7 Cir., 232 F. 2d 596, 109 USPQ 124."

The Sixth Circuit Court of Appeals has also answered the question of appellant Henderson herein in the affirmative. This Court's attention is respectfully directed to *Deering Milliken Research Corp. v. Electric Furnace Corp.* decided December 15, 1958; 261 F. 2d 619. In the *Deering* case the Sixth Circuit Court of Appeals disposed of the question presented in the following language:

"The appellant urges that the issuance of a patent put a heavy burden of proof upon one who challenges its validity and evidence that the alleged invention filled a long-felt want is prima facie evidence of invention, therefore, the District Court should have had the benefit of all of the evidence which the appellant could produce to support the presumption of validity. Such evidence, it recites, would include expert testimony interpreting the technical publications, evidence as to the state of the art and the duration of the problem's existence. With this evidence before it, the District Court would be in a position to render a decision

based upon the merits. The argument does not fit the present case. The specification of the patent fully discloses prior art and the specific nature of the improvements claimed. The publications relied upon by the appellee speak for themselves and no expert testimony can change their disclosure.”

It will therefore be seen that the question presented by the appeal herein has already been answered in the affirmative in the Ninth, Seventh, Sixth and Fifth Circuits. The appellant herein has failed to set forth any cogent reasons as to why the question should be answered in the negative in this case. The patent in suit and the prior art Hanks patent are both easily understandable by a court without the aid of expert testimony. Under these circumstances it was not necessary for the District Court to have before it any other facts than those disclosed by the Henderson and Hanks patents in order to rule as a matter of law that the Hanks patent anticipates Claim 6 of the Henderson patent in suit. Accordingly, it is clear that there is sufficient evidence sustaining the findings of the District Court herein to preclude such findings from being held “clearly erroneous” under F.R.C.P. 52 (a).

B. The Presumption Of Patent Validity Relied Upon By Appellant Does Not Apply.

In the Summary of Argument of Appellant’s Brief herein it is urged that the patent in suit should be presumed valid. It has been consistently held in the Ninth Circuit, however, that the usual presumption of validity which attaches to a patent is dissipated when the most pertinent prior art was not cited by the Patent Office.

This rule has been set forth in many cases including the recent case of *Monroe Auto Equipment Co. v. Superior Industries, Inc.* (May 1964) 332 F. 2d 473, Cert. Den. 379 U.S. 901, wherein the Court held:

“The existence of but one pertinent example of unconsidered prior art is not only sufficient basis to dissipate the presumption of validity (*Pressteel Co. v. Halo Lighting Products Inc. Supra*; *Jaybee Mfg. Corp. v. Ajex Hardware Mfg. Corp. Supra*), but may render the patent invalid.”

The Ninth Circuit *Pressteel* case is cited at 314 F. 2d 695 while the Ninth Circuit *Jaybee* case is cited at 287 F. 2d 228. Another Ninth Circuit case in point is *Jacuzzi Bros. v. Berkeley Pump Co.* 191 F. 2d 632.

Applying the law of the above cases to the facts of this case, the Hanks patent is not listed at the end of the Henderson patent in suit and accordingly the Hanks patent was not considered by the Patent Office during the prosecution of the patent in suit. Accordingly, the presumption of validity normally attaching to a patent is dissipated in this case, and this fact is set forth as Finding X made by the District Court.

C. There Is No Presumption Against Summary Judgment Where There Are No Genuine Issues Of Fact.

In the Summary of Argument of Appellant's Brief herein it is urged that there is a presumption against a summary judgment. This presumption, however, does not apply where there are no genuine issues of fact as in the present case. The Ninth Circuit has frequently granted motions for summary judgment in cases such as the present where there are no genuine issues of fact.

Recent decisions of this nature are *Englehard Industries v. Research Instruments* 324 F. 2d 347, cert. den. 377 U.S. 923, and *Oregon Saw Chain Co. v. McCulloch*, 323 F. 2d 758.

The following quotation by this Court in *Barkeij v. Lockheed* 210 F. 2d 1 is believed to be particularly in point:

“it is the duty of the Court to dismiss a patent infringement case whenever it affirmatively appears that the patent is invalid. (Citing cases.) If it affirmatively appears on a motion for summary judgment that the patent is invalid, the duty to dismiss is as compelling as it would be after hearing evidence.”

D. The Facts Which Appellant Urges Require Consideration Have No Relevancy To Anticipation Of The Henderson Patent In Suit By The Prior Art Hanks Patent.

Appellant urges that a multitude of matters of evidence must be considered on the issue of degree of similarity of the prior art. Such matters, however, have no relevancy to anticipation of the patent in suit by the prior art Hanks patent.

The recent Supreme Court decision in *Graham v. John Deere* cited in Appellant's Brief points out that 35 USC 102 expresses the “new and useful” tests of patentability while 35 USC 103 expresses the non-obvious” test of patentability. Further, that it is only in connection with the “non-obviousness” test that the factual criteria of the type set forth by appellant herein may have relevancy. The following language expresses this rationale:

“While the ultimate question of patent validity is one of law, *A & P Tea Co. v. Supermarket Corp.*, supra, at 155, the § 103 condition, which is but one of three conditions, each of which must be satisfied, lends itself to several basic factual inquiries. Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy.”

35 USC 102(b) requires that an invention be “novel” in order to be patentable. If the alleged invention has been patented by another more than one year prior to the date of the patent application therefor, the resulting patent is invalid. Under this test, the existence or nonexistence of the matters of evidence set forth by appellant herein is completely irrelevant and immaterial. The question as to whether or not the prior art Hanks patent discloses the same subject matter that is recited in Claim 6 of the Henderson patent can be easily decided by a mere comparison of the disclosures of the two patents.

CONCLUSION

It is appellant's position as indicated by the question presented by his Brief that a motion for summary judgment can never be granted where the plaintiff and defendant do not agree on the facts pertinent to the grounds for such summary judgment. If appellant's position is sound, a party could preclude the granting of summary judgment by simply producing groundless counter-affidavits or other evidence traversing the evidence advanced by the moving party. The appellant's position is obviously unsound and at odds with both law and reason. The appellant herein relies upon the same arguments as the appellant in the *Rankin* case discussed hereinbefore. These arguments are no more valid in this case than in the Rankin case.

All of the facts necessary to hold the Henderson patent in suit invalid were before the District Court. No other facts were needed. Under these circumstances it would be a waste of time and effort to require a full trial.

The Henderson patent in suit is fully anticipated by the prior art Hanks patent and thus invalid under the provisions of 35 USC 102 (b).

The usual presumption of validity relied upon by appellant does not apply because the Hanks patent was not cited by the Patent Office.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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LEE & UTECHT
FRANCIS A. UTECHT

*Attorneys for Defendant-Appellee
Ford Motor Company*

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FULWIDER, PATTON, RIEBER,
LEE & UTECHT

FRANCIS A. UTECHT

*Attorneys for Defendant-Appellee
Ford Motor Company*

APPENDIX

Appendix 1

May 7, 1963

R. A. HENDERSON

3,088,447

CONTROL FOR AUTOMOTIVE EXHAUST AIR POLLUTION

Filed Dec. 5, 1961

4 Sheets-Sheet 1

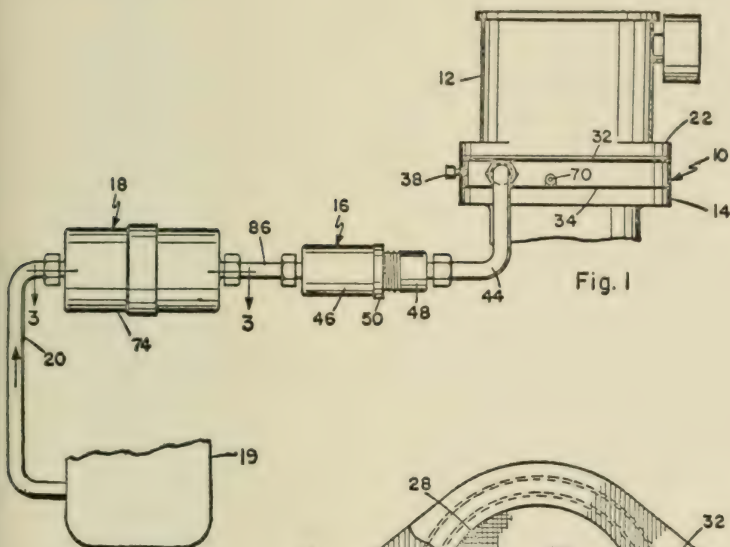


Fig. 1

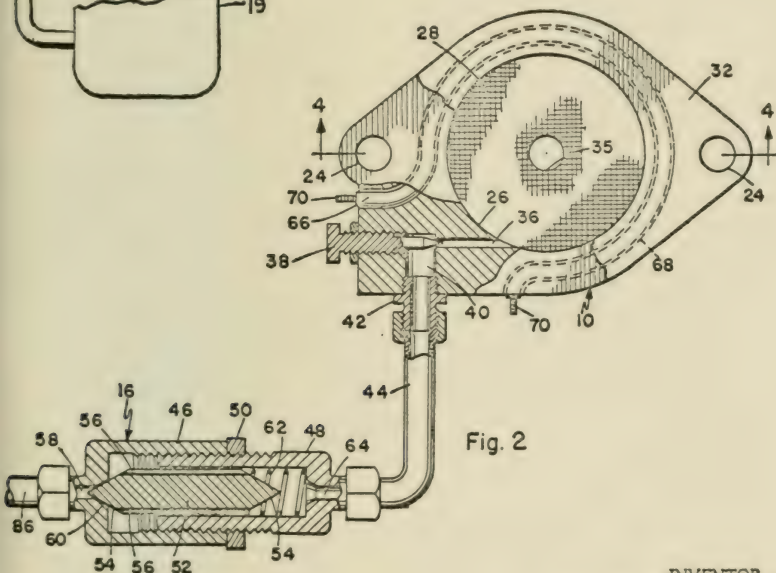


Fig. 2

INVENTOR.
RAY A. HENDERSON

BY

Knox & Knox

Appendix 2

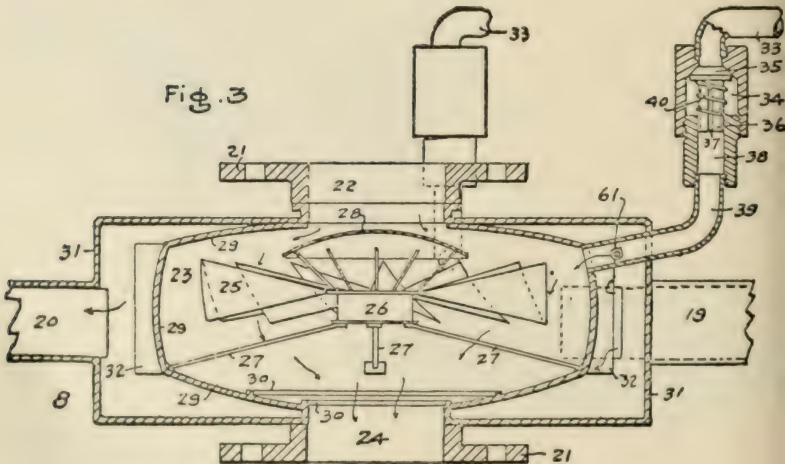
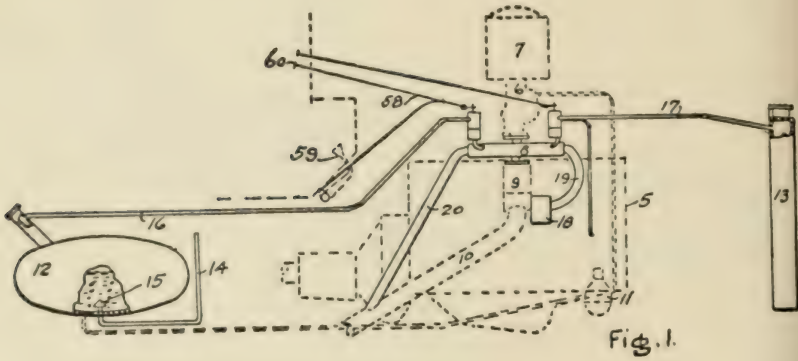
July 25, 1944.

L. HANKS
SUBCARBURETOR

2,354,373

Filed Feb. 3, 1943

2 Sheets-Sheet 1



IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELRANCO, INC., a Nevada corporation, EL RANCO HOTEL.
OPERATING Co., a Nevada corporation, BELDON R.
KATLEMAN, MCA ARTISTS, LTD., a Delaware cor-
poration, ROY GERBER and MATT GREGORY,

Appellants,

vs.

RENE BARDY,

Appellee.

REPLY BRIEF OF APPELLANTS ELRANCO, INC.,
EL RANCO HOTEL OPERATING CO. AND BEL-
DON R. KATLEMAN.

FILED

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Beldon R. Katleman.*

FEB 14 1967

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No. 20241

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELRANCO, INC., a Nevada corporation, EL RANCO HOTEL
OPERATING Co., a Nevada corporation, BELDON R.
KATLEMAN, MCA ARTISTS, LTD., a Delaware cor-
poration, ROY GERBER and MATT GREGORY,

Appellants,

vs.

RENE BARDY,

Appellee.

REPLY BRIEF OF APPELLANTS ELRANCO, INC.,
EL RANCO HOTEL OPERATING CO. AND BEL-
DON R. KATLEMAN.

Preliminary Statement.

This Reply Brief is intended to reply only to those matters contained in Appellee's Brief which Appellants feel are not adequately dealt with in their opening brief.

I.

Reply to Appellee's Answer to Point 1 A (Appellee's Brief 120-128).

The decisions of this Court cited by appellee (Appel-lee's Br. p. 121), holding that normally weight is ac-corded to a determination by the trial judge upon state law wherein he sits, have no application here. *People of the State of California v. United States* (9th Cir. 1956),

235 F. 2d 647, 654; *Citrigno v. Williams* (9th Cir. 1958), 255 F. 2d 675, 679; *Grabner v. Willys Motors, Inc.* (9th Cir. 1960), 282 F. 2d 644, 647. As this Court indicated in the *California* case, its deference to the interpretation of the trial judge therein was based upon the fact that the judge was "a lawyer of the state of long standing, acquainted with the imponderables and implications inherent in the pronouncement of the courts of the state." No such situation prevailed below. To the knowledge of the writer, the learned trial judge had never previously sat in Nevada. There is a statute involved which appellants urge is clear and unequivocal and even if this Court should disagree, there exists no reason whatsoever to defer to the construction thereof given by the Court below.¹

The contention (Appellee's Br. p. 123) that the fictitious name statute should be construed to require conducting, carrying on or transacting business at the time of commencement of the action because NRS 602.010 is in the present tense, has no merit. That section requires persons coming within its purview to file the fictitious name certificate. NRS 602.070 enjoins suit if there has not been compliance. The construction urged by appellee would in effect nullify the statute by permitting a person to avoid the injunction of the statute by the simple expedient of ceasing to use the fictitious name at the time suit is commenced upon a transaction arising under such name. Such a construction is not required by the statute, its purpose or common sense.

¹It is noteworthy that on page 127 of Appellee's Brief, appellee calls this Court's attention to the fact that the trial judge advised the parties during trial that he was not familiar with prevailing legal thought on the interpretation of the statute and the outcome of that issue would be a contingent development in the appellate litigation, if any.

II.

Reply to Appellee's Answer to Point 1 B (Appellee's Brief 129-136).

Appellee has answered appellants' argument that appellee is estopped to deny that La Nouvelle Eve Corporation is a corporation on the basis that the evidence supports a finding that appellee executed the original contract in his individual capacity and not on behalf of a separate legal entity. Appellee cites no authority in opposition to that of appellants on the estoppel doctrine. Appellee claims there existed a latent ambiguity in the original contract and additional information had to be supplied to show the ambiguity. As authority appellee cites one decision only dealing with identify of a contracting party, *M & J Diesel Locomotive Filter Corp. v. Nettleton* (1965), 56 Ill. App. 2d 146, 205 N.E. 2d 659.

In that case a lease and rider were prepared by the lessor and the place provided for the lessee to sign both contained signature lines describing the lessee as "Eugene M. Nettleton, d/b/a Midwest Building Supply by". Nettleton signed the lease and rider on the respective signature lines. There was no place for an attestation by a corporate secretary except opposite the lessor's signature line. The corporate secretary of the lessee did attest on that line on both the lease and rider. The lessee was a corporation, it carried on the corporate business on the demised premises and paid all rentals under the lease by corporate check. It was there held that as the identity of the lessee was not clear, extrinsic evidence was admissible.

Here, the December 1, 1958 contract stated that the artist was La Nouvelle Eve Corporation and it was

signed "P.P.R. Bardy". [Ex. D.]² On the AGVA form comprising the first page of the agreement it states that La Nouvelle Eve Corporation is "hereinafter called the 'Artist'" and in the rider it states "La Nouvelle Eve Corporation, hereafter referred to as artist." It provides that under the agreement all monies are payable to La Nouvelle Eve Corporation.

The March 6, 1959 contract provides that it is an "amendment to contract and riders dated December 1, 1959 (*sic*) between La Nouvelle Eve Corporation, Artist, and El Rancho Operating Company, Operator." It is signed "La Nouvelle Eve Corporation by R. Bardy". [Ex. 472.]

If a party could validly contend La Nouvelle Eve Corporation was not the contracting party, no contracting party could ever have any assurance as to whom he is dealing with and the large body of law dealing with the doctrine of estoppel to deny corporate existence would have no justification for its existence.

Appellee pounces upon an isolated letter by Katleman to AGVA which refers to the March 6, 1959 contract as a letter agreement between Hotel and "Mr. Bardy" as being a practical construction by Katleman that the original contract was signed by appellee in an individual capacity. (Appellee's Br. p. 132.) That letter can have no meaning for construction purposes, even assuming extrinsic evidence was admissible, as everything else in this voluminous record demonstrates that everyone, including appellee, considered the contracting party to be La Nouvelle Eve Corporation. (Appellants' Br. pp. 49-

²Appellee's Brief wholly ignores the significance of his use of "P.P."

51.) Typical is the letter of April 24, 1959 to AGVA seeking money deposited by Hotel for return transportation, which uses "we" throughout, is signed only "La Nouvelle Eve Corporation," and states that "according to our contract with El Rancho Vegas, this management had no right to pay money due to our company to anyone without our authorization". [Ex. N.]

On page 134 of Appellee's Brief, appellee contends that appellants have "seized" upon some different Conner letter to show that appellee wrote Conner after March 6, 1959 as to whether La Nouvelle Eve Corporation was a valid corporation. Appellee refers to no such different Conner letter in the evidence. Appellee's letter [Ex. 157] is entirely responsive to the Conner letter of March 2, 1959. [Exs. M-M-1.] "2-3-59" is the usual European way of indicating March 2, 1959. [Exs. 209, 473.]³ And appellants did state that Exhibit 157 was "probably sent before he returned to Paris on March 6th". (Appellants' Op. Br. p. 50.)

Appellee's contention that the jury could conclude that appellee's reference to AGVA in Exhibit 157 could have been the collective bargaining agreement between La Nouvelle Eve Corporation and AGVA [Ex. 105] is without basis. That agreement was executed on January 15, 1959, long after the December 1, 1958 contract was executed.

³Part of Exhibit 473 is a telegram from appellee to Gerber. In reading the telegram to the jury appellee's counsel said: "It reads: '12/3/59,' which, I believe, your Honor, is March 12, 1959. They reverse their numbers. If we could stipulate for the record." Such stipulation was made. [T. 253, lines 8-20].

III.

Reply to Appellee's Answer to Point II B (Appellee's Brief 137-139).

Appellee (Appellee's Br. p. 137) argues that the "jury could reasonable infer from the evidence that Bardy owned the nightclub and that the societies that exploited the nightclub were licensees" and therefore appellants were not entitled to an instruction that appellee did not own the nightclub. Appellee's own evidence is that Mansart, a corporation, owned the nightclub and it was always run by a succession of societies. Appellee has not called this Court's attention to any evidence otherwise and appellants were entitled to the requested instruction.

Appellee (Appellee's Br. p. 138) contends appellants' objection to the instruction was based upon a different reason from that set forth in appellants' brief. Appellants submit that no inconsistency exists and that Court and counsel were well aware of the basis for appellants' request. [T. p. 3215, line 25, to p. 3217, line 25.]

IV.

Reply to Appellee's Answer to Point III (Appellee's Brief 139-142).

Appellants' objection to admission of the assignments was proper. They were inadmissible because under Nevada law they were executed after the commencement of the action. *Thelin v. Intermountain Lumber*, 80 Nev. 285, 392 P. 2d 626 (1924). That decision is a flat holding that under Nevada law an assignee has no claim unless the assignment was executed prior to commencement of the action.

Whether the assignments executed after commencement of the action relate back is a matter of state sub-

stantive law and not a matter of procedure as urged by appellee. *Boeing Airplane Company v. Perry* (10th Cir. 1963), 322 F. 2d 589; *Texas San Juan Oil Corp. v. An-Son Offshore Drilling Co.* (D.C. N.Y. 1961), 194 F. Supp. 396; *Strate v. Niagara Machine and Tool Works* (S.D. Ind. 1958), 160 F. Supp. 296; *Wright v. Schebler Co.* (D.C. Iowa, 1965), 37 F.R.D. 319.

Moore's Federal Practice, Vol. 3, page 1305, states:

"The meaning and object of the real party in interest provision would be more accurately expressed if it read:

'An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced.' "

That the assignment question is a substantive one and not procedural is manifest. Indeed it is hard to conceive of anything of a more substantive nature than the question of whether or not a party has a claim.

Pioche Mines Consolidated, Inc. v. Dolman (9th Cir. 1964), 333 F. 2d 257, does not aid appellee. There, additional plaintiffs were added to a lawsuit after commencement.⁴ Here, no new plaintiffs were added, but rather, appellee, by the assignments, sought to create a right of action in himself retroactively, and under Nevada law, which applies, he could not do so.

Appellee contends (Appellee's Br. p. 142) appellants should have requested an instruction limiting the purpose of the assignments. As they were not admissible for any purpose, appellants are at a loss to understand such contention.

⁴Appellee is inaccurate when he states that Plaintiff in the *Pioche Mines* suit was not a shareholder at the time the transactions complained of occurred. Rather he had failed to allege his stockholder status and amendment was permitted because Rule 23(b) requirements are not jurisdictional.

V.

**Reply to Appellee's Answer to Point IV
(Appellee's Brief 146-148).**

The only credible evidence in the record with respect to payment for transportation is the receipt dated January 15, 1959, by Icelandic Airlines to MCA "as agent on behalf of La Nouvelle Eve Corporation" for the \$12,000.00 advanced by Hotel [Ex. Q], and subsequently the Hotel paid \$10,000.00 for the return transportation. [T. p. 2135, line 12, to p. 2139, line 2; Haettel Ex. D.] That no money was paid by appellee is confirmed by the letter from Icelandic to appellee dated February 16, 1959. [Ex. MS.]

The records kept by Conner were admissible as evidence as records made in the regular course of business. 28 U.S.C.A. 1732. Appellee testified the bills were presented to Conner. [T. p. 1272, lines 5-8.] Conner reflected them in his records. As a result, wholly apart from the \$10,000.00 advanced by the Hotel for return transportation, there was no money due La Nouvelle Eve Corporation under the December 1, 1958 agreement.

VI.

**Reply to Appellee's Answer to Point VII A
(Appellee's Brief 148).**

The tax returns referred to by appellee were in French and were never offered by appellee. Appellants submit that the fact that such exhibits were marked affords appellee no solace. He offered no financial records whatsoever. Appellee's self-serving statements, over valid foundation objections, that he spent "about" \$250,000.00 since 1956 for the show is not credible evidence. [T.

p. 1307, line 19, to p. 1308, line 12.]⁵ Appellee's March letter to Conner [Ex. 157] demonstrates the untruthfulness of appellee's testimony. In the letter he tells Conner his expenses were \$1,000 and Paris costs were \$2,500. Those Paris costs included "Authors' rights, copyrights, costume costs, shoes, wigs, hats, rehearsals, music, etc."

In any event, appellee's testimony does not satisfy the requirement of Nevada law that there "must be substantial evidence as to the amount of damage, as the law does not permit arriving at such amount by conjecture." *Alper v. Stillings*, 80 Nev. 84, 87, 389 P. 2d 239, 240 (1964).

VII.

Reply to Appellee's Answer to Point IX (Appellee's Brief 152-156).

Appellee contends that appellants claim of deprivation of a fair trial was an afterthought. Not only did appellants ask for a mistrial, but appellants felt the damage was irreparable and insisted on preserving their position and refused to be privy to an attempted corrective instruction. [T. p. 1345, lines 12-25.]

During the cross-examination of appellee, appellants' counsel frequently protested actions of the trial judge. (Appellants' Br. A-4, A-6, A-10, A-11, A-12, A-13, A-17, A-21, A-26, A-27, A-39, A-43.)

Appellants also submit that there is little for counsel to do when the following occurs:

"The Court: How much longer do you estimate you will be, Mr. Lionel?

⁵The Court requested Appellee's counsel to ask appellee "... how much he had invested."

Mr. Lionel: At least a day, your Honor.

The Court: No you won't, I will give you tomorrow morning at the outside. . . ." [T. p. 1441, lines 21-25.]

and

"The Court: Have you about concluded?

Mr. Lionel: I would say I have about 30 or 40 minutes more, your Honor.

"The Court: No. It is 1:00 o'clock now. We will take the recess, and boil it down to ten minutes." [T. p. 1565, lines 2-6.]

What kind of protest or objection can counsel make under such circumstances. Appellants strongly urge this Court to read the entire cross-examination of appellee. It comprises only a portion of Volume VI of the Transcript. Such reading will demonstrate the many difficulties counsel had because of the conduct of appellee's counsel and the Court. It will also demonstrate that appellants' counsel treated the trial judge with the utmost respect at all times and does not now intend otherwise, and the argument on this issue is not intended to be an "attack" on the trial judge as appellee characterizes it.

On page 154, appellee accuses this writer of "attempting to manipulate the translation" with respect to the use of the word "corporation".⁶ Appellee's citations to

⁶Appellee's counsel himself used the word "corporation" in his direct examination of appellee.

"Q. Did you do anything about a Monte Carlo corporation?

"A. Certainly, right away.

"Q. What else did you do as to a Monte Carlo corporation?

"A. The new corporation was — I called it the New Company, the La Nouvelle Eye Corporation." [T. p. 1144, line 25, to T. p. 1145, line 15].

the record in support of that charge are also during appellee's cross-examination. A reading of that portion of the record demonstrates appellee's charge is wholly unfounded.

Conclusion.

The judgment should be reversed.

Respectfully submitted,

SAMUEL S. LIONEL and
LEO K. GOLD,

By SAMUEL S. LIONEL,
*Attorneys for Appellants Elranco, Inc.,
El Rancho Hotel Operating Co., and
Beldon R. Katleman.*

Certificate.

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

SAMUEL S. LIONEL

No. 20744 ✓

UNITED STATES
COURT OF APPEALS
For the Ninth Circuit

SEATTLE-FIRST NATIONAL BANK, a National Banking
Association, as Trustee, *Appellant*,

vs.

THE CROWN LIFE INSURANCE COMPANY,
a Corporation, *Appellee*

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT
United States District Judge

OPENING BRIEF OF APPELLANT

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| 1 Couch on Insurance 2d, 144, Sec. 3.21 | 20 |
| 1 Couch on Insurance 2d, 148, Sec. 3.23 | 20 |
| IX Wigmore on Evidence (3rd Ed.) | |
| Sec. 2452, p. 168 | 20 |

Federal Rules of Civil Procedure

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| Rule 52 (a) | 29 |
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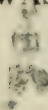
**UNITED STATES
COURT OF APPEALS**
For the Ninth Circuit

SEATTLE-FIRST NATIONAL BANK, a National Banking
Association, as Trustee, *Appellant*,

vs.

THE CROWN LIFE INSURANCE COMPANY,
a Corporation, *Appellee*

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON SOUTHERN DIVISION**

HONORABLE GEORGE H. BOLDT
United States District Judge

OPENING BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This is a civil action in contract commenced by the appellant, SEATTLE - FIRST NATIONAL BANK, a national banking association organized and existing under the laws of the United States of America, against the appellee, THE CROWN LIFE INSURANCE COMPANY, an alien Canadian corporation, for recovery of the sum of \$288,017.52, together with interest thereon, in accordance with the terms and provisions of a life insurance policy (Ex. 2) issued by appellee and under which appel-

lant was and is the named beneficiary. (Clerk's Transcript of Record, pages 1-21; herein referred to as Clk. R. 1-21). The action was filed by appellant on February 11, 1963 in the United States District Court for the Western District of Washington, Southern Division. (Clk. R. 1). It is a civil action between a citizen of the United States and a citizen of a foreign state wherein the matter in controversy, exclusive of interest and costs, exceeds the sum of \$10,000 (Clk. R. 43). The United States District Court had jurisdiction of the action under and by virtue of 28 U.S.C.A. Section 1332(a) (2). Following trial of the action before the Honorable George H. Boldt, sitting without a jury, a judgment of dismissal was entered on December 13, 1965 (Clk. R. 66) from which an appeal was taken by appellant on January 11, 1966 (Clk. R. 67). The appeal was filed and docketed in this Court on January 31, 1966 and February 15, 1966, respectively. This Court has jurisdiction to review the judgment in question under and by virtue of 28 U.S.C.A. Sections 1291 and 1294(1).

STATEMENT OF THE CASE

Statement of Facts

As appears from the record herein, substantially all of the relevant and admissible facts are undisputed and may be found in the agreed Pretrial Order entered by the lower court on December 13, 1965 (Clk. R. 43-49).

At all times material herein appellant, Seattle-First National Bank, was and now is a national banking association with its main office in Seattle, Washington, and, the appellee, The Crown Life In-

Insurance Company, was and now is an alien Canadian corporation with its principal place of business in Toronto, Canada, engaged in the business of transacting life and disability insurance as an alien insurer in the State of Washington (Clk. R. 1-2).

At all times material herein until his death on December 7, 1961, Charles M. Clark (herein referred to as "Clark"), was an individual married to Eleanor S. Clark and they resided as husband and wife in Seattle, Washington (Clk. R. 44).

On December 1, 1959, Clark executed a written application to appellee (Ex. 1) for a policy of term insurance on his life in the amount of \$300,000 and directed appellee to name as the beneficiary thereof "Eleanor S. Clark, wife, if living, if not to insured's living children—equally." In said written application (Ex. 1) it was provided:

"(2) The policy applied for shall not take effect until it has been manually received and accepted by the owner and the first premium paid thereon, and it shall then be effective only if there has been no change in the insurability of the proposed insured subsequent to the completion of this application."

(Clk R. 44)

Said written application (Ex. 1) was approved by appellee and appellee issued and delivered to Clark in Seattle, Washington, a term policy of insurance on Clark's life, No. 835,907 in the amount of \$300,000. Said policy (herein referred to as the "Original Policy") has never been in appellant's possession nor has appellant ever seen or examined the same. (Clk. R. 44-45).

Thereafter, Clark executed and delivered to appellee a written document dated February 28, 1961,

entitled "Request for Change in Policy," requesting appellee to "Convert policy to Guaranteed Equity Plan, \$300,000, Annual Premium—Non Par effective 11, December, 1960" (Clk. R. 45-46).

Pursuant to said request, appellee issued and delivered to Clark the written policy of life insurance (Ex. 2) which is the basis of appellant's claim for relief in this action. Said policy (herein referred to as the "Converted Policy") is dated March 8, 1961. The beneficiary named therein is "ELEANOR S. CLARK (wife of the insured) if living; otherwise the children of the insured in equal shares or the survivors in equal shares, or the survivor." The Converted Policy bears the same policy number as did the Original Policy (835,907), is in the same amount as the Original Policy (\$300,000), and was issued and delivered to Clark without medical examination. Upon delivery to him of the Converted Policy, Clark at appellee's request, surrendered to appellee the Original Policy which was thereafter destroyed by appellee (Cl. R. 46).

At the time said Converted Policy (Ex. 2) was delivered to Clark the following riders and endorsements were attached thereto (Clk. R. 46):

Written application for insurance dated December 1, 1950 (Ex. 1) referred to above;

"Change of Beneficiary Form" dated December 18, 1959, executed by Clark and directing the appellee to "Change the beneficiary to Executors, Administrators or Assigns of the Insured";

"Request for Change in Policy" dated December 18, 1959, executed by Clark, requesting appellee to "Change the premium to \$3,586.50 payable on the 11 day of December in each year",

effective as from the 11 day of December, 1959; and the

"Request for Change in Policy" dated February 28, 1961, wherein Clark requested the appellee to "Convert Policy to Guaranteed Equity Plan, \$300,000, annual premium—Non Par, effective 11, December, 1960."

On September 28, 1961, pursuant to Clark's written request (Ex. A-3) which was and is attached to the Converted Policy, appellant became and at all times since has remained the sole beneficiary of the Converted Policy (Clk. R. 47-48).

Clark died by suicide in Seattle, Washington, on December 7, 1961. At the time of his death, all premiums due and payable under the Converted Policy in the aggregate amount of \$11,982.48 had been paid in full and said Converted Policy was in full force and effect (Clk. R. 48).

At the time of Clark's death the Converted Policy (Ex. 2) contained an incontestable clause and a suicide clause providing, respectively, as follows:

"6. *Incontestability.* This policy will be incontestable after it has been in force during the lifetime of the insured for two years from the date on which it became effective; except for non-payment of premiums and except for any benefits in case of Total Disability or Accidental Death and except for risks not assumed or insured against under this policy.

"12. *Claims.* * * * If the insured shall die by suicide, whether sane or insane, within two years of the date on which this policy became effective, the liability of the Company hereunder shall be limited to a return of the premiums paid."

Following Clark's death appellant, as the named

beneficiary of the Converted Policy, submitted to appellee a written claim (Ex. 4) for the death benefits thereof in the sum of \$300,000, and in conjunction with said claim, surrendered the Converted Policy to the appellee (Clk. R. 49). Appellee denied any liability to appellant for the face amount of the Converted Policy and in lieu thereof tendered to appellant the sum of \$11,982.48 representing a return of premiums paid by Clark. Initially, appellant rejected said tender but later accepted the same pursuant to a stipulation with appellee that such acceptance would not prejudice appellant's right to pursue its claim for the balance of the face amount of the Converted Policy (Clk. R. 49). Thereafter, on February 11, 1963, appellant commenced this action.

Pleadings, Pretrial Proceedings and Trial

In its complaint (Clk. R. 1-21) appellant alleged and contended that as the named beneficiary of the Converted Policy (Ex. 2) it was entitled to recover judgment against the appellee for the remaining unpaid balance of the face amount of the Converted Policy (\$288,017.52) together with interest thereon.

Appellee in its answer (Cl. R. 22-24) admitted the existence of the Converted Policy and, by way of affirmative defense, alleged that the Converted Policy had become effective no earlier than December 11, 1959, within two years of Clark's death by suicide, and that under the policy's suicide clause set forth above, its liability to appellant was limited to a return of premiums paid.

On August 3, 1965, appellant and appellee executed and filed with the Clerk of the District Court an agreed Pretrial Order (Clk. R. 43-58) which was entered by the lower court on September 27, 1965.

(Clk. R. 58). Thereafter, prior to trial, appellant and appellee, through their respective counsel, executed and entered into an Amended Stipulation (Clk. R. 60-61) wherein appellant stipulated, subject to its right to object to the admissibility thereof at the time of trial, that, if present, one Robert H. Edmiston of Seattle, Washington, would testify to the matters and facts therein set forth.

The case went to trial before the Honorable George H. Boldt, sitting without a jury, on November 29, 1965. In support of its claim for relief, appellant offered Exhibits 1 through 4, including the Converted Policy with its attachments (Ex. 2) which were admitted in evidence without objection (Reporter's Transcript of Proceedings, page 2; herein referred to as Rep. Tr. 2). Thereupon, appellant rested its case (Rep. Tr. 3).

In defense, appellee then elicited and offered in evidence the testimony of Gordon John Hirlihey, manager of appellee's policy issuing department (Rep. Tr. 3-14), the testimony of Elizabeth Jean Dawson, the cashier of appellee's Seattle agency (Rep. Tr. 16-17, 19-21), the testimony of Robert H. Edmiston (Rep. Tr. 18-19) as contained in the Amended Stipulation between the parties (Clk. R. 60-61), and Exhibits A-1 through A-10, which were admitted in evidence by the lower court over the continuing objection of appellant's counsel, interposed upon the ground that such evidence and testimony violated the parol evidence rule and the rule of statutory integration of life insurance contracts as contained in The Insurance Code of the State of Washington. (Rep. Tr. 6-7, 18).

Upon the conclusion of the trial and after hearing argument of counsel, the lower court rendered an

oral opinion (Rep. Tr. 22-24) in favor of the appellee. The lower court ruled purely as a matter of interpretation and construction of the Converted Policy, with its attachments (Ex. 2), that, for purposes of the suicide clause, the date of issue and effective date of said policy was, at the earliest, December 11, 1959; and that as Clark's suicide had occurred within two years of that date (December 7, 1961) appellant was not entitled to recover from appellee the face amount of the policy. On December 13, 1965, Findings of Fact (Clk. R. 62-64), Conclusions of Law (Clk. R. 64-65) and Judgment of Dismissal (Clk. R. 66) were entered, dismissing appellant's action with prejudice and granting appellee judgment against appellant for its taxable costs and disbursements.

The Questions Involved

The questions presented on this appeal are as follows:

1. Whether parol or other evidence extrinsic of the Converted Policy and its attachments (Ex. 2), was admissible in evidence at the instance of the appellee insurer to construe, supply or prove any term or provision of the insurance contract between Clark and the appellee insurer?

2. What was the commencement date of the two year period of the suicide clause in the Converted Policy?

3. Whether, as a matter of law, the suicide clause in the Converted Policy is so incomplete and ambiguous as to render the same unenforceable against the appellant?

4. Whether, as a matter of law, the suicide clause contained in the Converted Policy violates the pub-

lic policy of the State of Washington as contained in The Insurance Code of the State of Washington and, for that reason, is illegal, void and unenforceable?

SPECIFICATIONS OF ERROR

The specifications of error relied upon and which are intended to be urged are as follows:

1. The trial court erred in admitting any evidence offered by appellee which was not in writing and physically attached to the Converted Policy. In particular, the trial court erred in admitting in evidence the following testimony and documents over the continuing objection of appellant's counsel, interposed upon the ground that the same violated the parol evidence rule and the rule of statutory integration of life insurance contracts as contained in The Insurance Code of the State of Washington (Rep. Tr. 6-7, 17-18):

- (a) The testimony of the witness Gordon John Hirlihey, elicited in connection with appellee's Exhibits A-1, A-2 and A-9, to the effect that, under the terms and provisions of the Original Policy issued by appellee to Clark (which was not physically attached to the Converted Policy) the date of issue thereof was December 11, 1959, that the same was a 27-year term policy to age 65, that the expiration date thereof was December 11, 1986, that the first premium due date thereof was December 11, 1959, that the first policy year thereunder commenced December 11, 1959, that said Original Policy was typed and prepared on December 11, 1959, and that appellee's Exhibit A-9 was a duplicate copy of

said Original Policy (Rep. Tr. 8, line 1, to 11, line 20).

(b) The testimony of the witness Robert H. Edmiston (Rep. Tr. 18) as contained in an Amended Stipulation (Clk. R. 60), to the effect that he was the agent who wrote the insurance on Clark's life and that the Original Policy was delivered to Clark and the first premium thereon paid by Clark on the same day that Clark's check in the amount of \$3,586.50 (Ex. A-6) was delivered to appellee at its Seattle office.

(c) Appellee's Exhibits A-1 (Master record sheet) and A-2 (premium card) which were not attached to the Converted Policy, purporting to show the terms, provisions, form, amount, plan, date of issue, premium, first premium due date, and beneficiary of the Original Policy (Rep. Tr. 8, line 1, to 11, line 20).

(d) Appellee's Exhibit A-6 (Rep. Tr. 17), being a cancelled check dated December 18, 1959, drawn by Clark and payable to the order of appellee in the sum of \$3,586.50; together with appellee's Exhibit A-10, being a photocopy of a cash receipt (Rep. Tr. 19) prepared at appellee's Seattle office purporting to show the receipt by appellee from Clark on December 18, 1959, of appellee's Exhibit A-6; which said Exhibits A-6 and A-10, in conjunction with the testimony of the witness Robert H. Edmiston, were offered by the appellee as proof that the first premium payment on the Original Policy was made on December 18, 1959. (Rep. Tr. 17, 20).

(e) Appellee's Exhibit A-9 (Rep. Tr. 14), which was not attached to the Converted Policy, and which purports to be a specimen copy of the Original Policy issued by appellee to Clark, reconstructed and prepared by appellee from Exhibit A-1, approximately one week prior to trial. (Rep. Tr. 11).

2. The trial court erred in finding as a matter of fact (Finding of Fact I, Clk. R. 62) that a policy of term insurance on the life of Clark was issued by appellee on the 11th day of December, 1959, for the reason that there was no admissible evidence to support of such finding, and for the further reason that such finding is a conclusion of law.

3. The trial court erred in finding as a matter of fact (Finding of Fact II, Clk. R. 63) that the Converted Policy became effective December 11, 1960, for the reason that there was no admissible evidence to support such finding and for the further reason that such finding constitutes a conclusion of law.

4. The trial court erred in finding as a matter of fact (Finding of Fact V, Clk. R. 64) that under the terms and provisions of the Converted Policy (Ex. 2) the date of issue of the Original Policy and its effective date was fixed at December 11, 1959, and in further finding as a matter of fact that the two year period of the suicide clause commenced as of said date, for the reason that there was no admissible evidence to support such finding and for the further reason that such finding, in its entirety, constitutes a conclusion of law.

5. The trial court erred in concluding (Findings of Fact V and VI, Clk. R. 64, Rep. Tr. 23-24) that, under the terms and provisions of the Converted

Policy (Ex. 2), without reference to anything else, the date on which said Converted Policy became effective, for purposes of construing and applying the suicide clause contained in said policy, was December 11, 1959, and in failing to conclude that, under the terms and provisions of said Converted Policy, without reference to anything else, the date on which said policy became effective, for purposes of said suicide clause, was December 1, 1959.

6. The trial court erred in failing to conclude that, as a matter of law, the suicide clause contained in said Converted Policy (Ex. 2) is so incomplete and ambiguous as to render the same unenforceable as a contractual limitation upon appellee's liability to appellant.

7. The trial court erred in failing to find and conclude that, as a matter of law, the suicide clause contained in said Converted Policy (Ex. 2) violates the public policy of the State of Washington as announced in The Insurance Code of the State of Washington and for that reason, was and is illegal, void and unenforceable.

8. The trial court erred in failing to conclude that, under established rules of construction pertaining to life insurance contracts, the appellee failed to sustain the burden of proving by competent and admissible evidence that the two-year period of the suicide clause as contained in the Converted Policy commenced within two years of the date of Clark's suicide.

9. The trial court erred in concluding (Conclusions of Law I and II, Clk. R. 64-65) that appellant is not entitled to recover from appellee and in failing to conclude that appellant is entitled to judgment

against appellee in the sum of \$288,017.52 together with interest thereon.

ARGUMENT OF THE CASE

Summary of Argument

The argument falls into two basic parts, first, an argument that the trial court committed reversible error by admitting parol evidence to construe and interpret the terms and provisions of an integrated life insurance contract; and second, an argument that the trial court's interpretation and construction of said integrated life insurance contract was erroneous.

The argument may be summarized as follows:

Part I: Under the rule of integration of The Insurance Code of the State of Washington, the Converted Policy, with its attachments, constituted an integrated contract of insurance; the terms and provisions of the suicide clause contained in said Converted Policy must be construed within the "four corners" of the Converted Policy with its attachments; and neither parol nor other evidence extrinsic of (not attached to) the Converted Policy was admissible in evidence at the instance of the appellee insurer, to prove either the "date of issue" or the "effective date" of either the Original Policy or the Converted Policy, for purposes of determining, as a matter of construction, the commencement date of said suicide clause.

Part II: The suicide clause as contained in the Converted Policy is incomplete and capable of two or more meanings or susceptible of two or more constructions, and, in addition, does not comply with The Insurance Code of the State of Washington

(R.C.W. 48.23.260(1)(b); under well established rules of construction relating to exclusionary clauses in life insurance contracts, the trial court was required to conclude, as a matter of law, that under the terms and provisions of the Converted Policy, with its attachments, the two-year period of the suicide clause commenced not later than December 1, 1959. Accordingly, the trial court's conclusion that said two-year period commenced not earlier than December 11, 1959, was erroneous.

ARGUMENT

PART I

Specification of Error No. 1

PAROL OR OTHER EVIDENCE EXTRINSIC OF THE CONVERTED POLICY WAS NOT ADMISSIBLE AT THE INSTANCE OF THE APPELLEE INSURER AS PROOF OF ANY TERM OR PROVISION OF THE INSURANCE CONTRACT

At the trial of this action in the lower court appellant, in support of its case, offered in evidence Exhibits 1 through 4, including the Converted Policy with its attachments (Ex. 2) which were admitted in evidence without objection (Rep. Tr. 2). Thereupon, appellant rested its case (Rep. Tr. 3). At that juncture, the entire written insurance contract (Ex. 2) comprising the basis of appellant's claim for relief was before the lower court for construction and interpretation. At that juncture it was admitted that, at the time of Clark's death, the Converted Policy was in full force and effect, all premiums due and payable thereunder had been paid in full, and that appellant was the sole named beneficiary thereof.

(Pre. Tr. Or., Ad. Facts 12, 13; Clk. R. 48). At that juncture appellant was entitled to recover from appellee the full face amount of the Converted Policy unless the appellee proceeded as a matter of defense, to establish by a preponderance of admissible evidence, that the Converted Policy contained an *enforceable* exclusionary provision *applicable* to restrict or defeat such recovery. *Williams vs. Metropolitan Life Ins. Co.*, (S.C., 1943) 25 S.E.(2d) 243, 245; *Chavis vs. Home Security Life Ins. Co.*, (N.C., 1960) 112 S.E.(2d) 574, 576; *Casey vs. Metropolitan Life Ins. Co.*, (1921) 189 N.Y.S. 70.

In an attempt to sustain this burden of proof, appellee proceeded to elicit and offer in evidence the testimony of Gordon John Hirlihey, manager of appellee's policy issuing department (Rep. Tr. 3-14), the testimony of Elizabeth Jean Dawson, the cashier of appellee's Seattle agency (Rep. Tr. 16-17, 19-21), the testimony of Robert H. Edmiston, (Rep. Tr. 18-19; Clk. R. 60-61) and, in conjunction with such testimony, also offered in evidence certain written documents, Exhibits A-1, A-2, A-6, A-9 and A-10, none of which had been or were attached to or comprised a part of the Converted Policy. The trial court admitted the testimony and said exhibits over the continuing objection of appellant's counsel, interposed upon the ground that the admission thereof violated the parol evidence rule and the rule of integration of life insurance contracts as contained in The Insurance Code of the State of Washington (Rep. Tr. 6-7, 18).

This testimony and the listed exhibits were offered by appellee and admitted by the trial court for the obvious purpose of establishing (i) the date of issue of the Original Policy; (ii) the date of delivery

and date of first premium payment of the Original Policy; (iii) the terms and provisions of the Original Policy; and (iv) derivatively, *the effective date of the Converted Policy*.

Appellee's Exhibit A-1 is an internal business record entitled "Master Record Sheet" maintained by appellee at its home office. (Rep. Tr. 4-5). According to Mr. Hirlihey, it is the document from which the Original Policy was prepared. (Rep. Tr. 4, 8).

Similarly, appellee's Exhibit A-2 is an internal business record maintained by appellee at its home office, designated by Mr. Hirlihey to be a "Premium Card," prepared from the Master Record Sheet. (Rep. Tr. 9-10).

After testifying as to the contents of the Master Record Sheet (Rep. Tr. 8-9), Hirlihey further testified that appellee had destroyed the Original Policy (Rep. Tr. 9):

"Q. Mr. Hirlihey, what has happened to the original term policy, No. 835907?

"A. Our general practice on term policies, when they are converted, the converted policy is issued under the same number, and we ask for the return of the original policy, and it is our normal procedure to destroy this, because the new policy is a continuation of the original policy. We have filing problems, if you retain a complete policy. We can produce the original policy from this form, and it is much easier to keep a single sheet of paper than to keep several copies of pages."

Thereupon, appellee offered and there was admitted in evidence Exhibit A-9 which purported to be a copy of the Original Policy issued to Clark, reconstructed and prepared by appellee approximately one week prior to trial, from the Master Record

Sheet. (Rep. Tr. 11). Then, through the testimony of Mrs. Dawson, cashier of appellee's Seattle agency, appellee introduced in evidence, over the continuing objection of appellant (Rep. Tr. 17) extraneous exhibits A-6 and A-10.

Exhibit A-6 is a cancelled check dated December 18, 1959, drawn by Clark and payable to the order of the appellee in the sum of \$3,586.50 (Rep. Tr. 17). Exhibit A-10 is a photocopy of a Cash Receipt kept in appellee's home office (Rep. Tr. 19-20) which purports to show that Clark's cancelled check (Ex. A-6) was received by appellee and deposited on December 18, 1959 (Rep. Tr. 19-20). In order to complete the tainted circle of evidence, appellee then introduced, over the objection of appellant (Rep. Tr. 18) the written testimony of Robert H. Edmiston (Clk. R. 60), the agent who wrote the insurance on Clark's life, to the effect that the Original Policy was delivered to Clark upon the same day that Clark's check in the amount of \$3,586.50, payable to appellee's order (presumably Ex. A-6) was turned over to appellee at its Seattle office.

All of the foregoing evidence and testimony was extraneous of the Converted Policy and related solely to the negotiations and transactions between Clark and the appellee with respect to the Original Policy, which was not attached to and comprised no part of the Converted Policy.

As will be demonstrated, in Part II hereof, appellee, by destroying the Original Policy and failing to attach the same, or a proper endorsement, to the Converted Policy, created a situation under which the insured could not determine his contractual rights under the written policy in his possession. In such case, the appellee insurer may not defeat its

contractual liability to the beneficiary by supplying missing terms and provisions of an exclusion with oral testimony and documentary evidence extraneous of the written policy.

Under The Insurance Code of the State of Washington, the Converted Policy, with its attachments (Ex. 2) is constituted an integrated contract of insurance as a matter of law.

In this regard the applicable sections of The Insurance Code (R.C.W. Title 48) provide as follows:

R.C.W. Sec. 48.18.140. Contents of policies in general.

“(1) The written instrument, in which a contract of insurance is set forth, is the policy.”

R.C.W. Sec. 48.18.190. Policy must contain entire contract.

“No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.”

R.C.W. Sec. 48.18.520. Construction of Policies.

“Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended or modified by any rider, endorsement, or application attached to and made a part of the policy.”

R.C.W. Sec. 48.23.040 Entire contract—Representations.

“In all such policies other than those containing a clause making the policy incontestable from date of issue, there shall be a provision that the policy and the application therefor, if a copy thereof has been endorsed upon or attached to the policy at issue and made a part

thereof, shall constitute the entire contract between the parties . . .”

In addition, the Converted Policy, in pertinent part, reads as follows:

“5. *The Contract* This policy and the application therefor, a copy of which is attached hereto and made a part hereof, constitute the entire Contract.”

The foregoing provisions of The Insurance Code and the quoted provision from the Converted Policy require the conclusion that written documents and oral testimony extrinsic of (not attached to) the written policy itself may not be considered by the Court to supply or construe any term or provision of the insurance contract that would defeat or limit the liability of the insurer.

The purpose of this statutory requirement (that the entire contract be physically embodied in the policy), is stated in 1 *Couch on Insurance* 2d, Sec. 3.20 at page 143:

“ . . . statutes of this character are clearly intended to protect the policy holder by requiring the insurer to place in his hands written evidence of the entire contract, or, in other words, by requiring all the terms, conditions and representations, to be incorporated or embodied in the policy, and thereby largely eliminate the evils growing out of uncertainty and the imposition which might otherwise be practiced, by permitting the insurer to know from his policy what his contract is. In fact, the laudable purpose is to furnish both parties the entire contract between them, and to enable them both to be informed of the exact terms of the policy.”

As a consequence, under the statutes set forth above, the policy, with its attachments, constitutes the sole

contract, “. . . to the exclusion of all anterior or contemporaneous agreements not contained or expressed in the policy . . .” 1 *Couch on Insurance* 2d 144, Sec. 3.21.

As a further result of the statutory requirement: “. . . nothing can be added to the contract as written, by construction or otherwise, except such terms as may be imposed upon the parties by operation of some valid and applicable law with reference to which the parties are deemed to have contracted.” 1 *Couch on Insurance* 2d 148, Sec. 3.23.

The obvious end result of this doctrine of statutory integration, as it relates to contracts of insurance, is set forth in *IX Wigmore on Evidence* (3rd Ed.) Sec. 2452, at page 168, as follows:

“By statute in numerous jurisdictions [including Washington by footnote reference] all parts of a transaction of life insurance must be embodied in a single document. The construction of this type of statute illustrates neatly the distinction between the doctrine of integration * * * and that of written formality * * *; *because even written parts of the transaction not embodied in the policy will by this rule be ignored. It is also to be noted that these statutes go further than any other application of the rule, in that they require a physical and not merely (as for wills) a grammatical or literary integration.*” (Emphasis added)

In other words, any document, in order to be considered in connection with or as part of the insurance contract before the Court, must be *physically* attached to the policy evidencing the contract. *Western Casualty & Surety Co. v. Harris Petroleum Co.*, (S.D. Cal. 1963) 220 F. Supp. 952 (Under R.C.

W. Sec. 48.18.190, neither prior unattached policies nor unattached business records of the insurer may be considered on question of coverage under subsequent policy); *Nat. Ind. Co. vs. Smith-Gandy*, (1957) 50 Wn.2d 124, 309 P.2d 742 (prior correspondence between insurer and insured not admissible on question time policy became effective); *Washington Fire Relief Ass'n v. Albro*, (1924) 130 Wash. 114, 226 Pac. 264 (application for fire insurance not attached to policy not admissible at instance of insurer); *National Life & Accident Ins. Co. v. Barlow*, (Ky., 1933) 57 S.W.2d 997, 1000 (insurer's rating manual, unattached to policy, not admissible as defense to policy coverage); *Frost v. Metropolitan Life Ins. Co.*, (Pa., 1940) 12 A.2d 309 (application folded in but not attached to policy, inadmissible at instance of insurer); *Blatz v. Travelers Ins. Co.*, (1947) 68 N.Y.S.2d 801 (aviation exclusion by rider delivered to insured but not attached to policy, inadmissible and ineffective as defense to action on life policy); *Coughlin v. Reliance Life Ins. Co.*, (Minn., 1925) 201 N.W. 920, 922 (terms of promissory note given as premium payment on life policy not admissible to prove lapse for non-payment of premium); *Jones v. Metropolitan Life Ins. Co.*, (Pa. 1944) 39 A.2d 721 (booklet of insurer not attached to policy held inadmissible to supply provision favorable to insurer).

As stated in *Archer v. Equitable Life Assur. Soc. of U.S.*, (N.Y., 1916) 112 N.E. 433, at page 435:

"All of the stipulations, agreements, or statements constituting the contract must be placed, through the delivery of the policy, in the possession of and be and remain accessible to the insured."

The public policy sustaining such a statutory requirement is obvious. It reduces the contract or policy to one paper and “. . . leaves a complete written record of the business when the insured cannot speak.” *Coughlin v. Reliance Life Ins. Co.*, supra. The rule applies to bar from evidence offered at the instance of the insurer, “. . . policies of insurance previously issued to the same applicant.” *Abbott v. Prudential Ins. Co. of America*, (N.Y., 1939) 24 N.E. 2d 87, 90. It even serves to render ineffective conditions and stipulations on the reverse side of a policy not sufficiently referred to on the face of the policy. *Burbank v. Pioneer Mut. Ins. Ass’n*. (1910) 60 Wash. 253, 110 Pac. 1005.

The rule is clear. The testimony of the witnesses Hirlihey and Edmiston and appellee’s Exhibits A-1, A-2, A-6, A-9 and A-10 were offered by the appellee and admitted and considered by the lower court for the purpose of construing, interpreting and supplying an omission from the terms and provisions of the exclusionary suicide clause of the Converted Policy. Such testimony and exhibits should have been excluded and appellant’s objections thereto sustained. Appellant respectfully submits that, in admitting this parol evidence, the trial court committed reversible error.

PART II

Specifications of Error Nos. 2-9

THE TRIAL COURT'S DETERMINATION THAT THE COMMENCEMENT DATE OF THE TWO-YEAR PERIOD OF THE SUICIDE CLAUSE WAS FIXED IN THE CONVERTED POLICY AS DECEMBER 11, 1959, WAS ERRONEOUS. UNDER THE CONSTRUCTION OF SAID CLAUSE MOST FAVORABLE TO THE APPELLANT THE TWO-YEAR PERIOD THEREOF COMMENCED NOT LATER THAN DECEMBER 1, 1959, MORE THAN TWO YEARS PRIOR TO CLARK'S SUICIDE

Introduction

As with all life insurance policies issued in this day and age, the Converted Policy (Ex. 2) is replete with printed provisions, riders and endorsements, commencing with a copy of Clark's written application for insurance (Ex. 1) dated December 1, 1959. These provisions are calculated to extend, define and restrict the appellee insurer's liability. They do not, however, accomplish this purpose in one fatal respect. The Converted Policy does not contain among its many provisions "the date on which this policy became effective" for purposes of determining the commencement date of the two-year period of the suicide clause. As will be demonstrated, this simple omission completely emasculates the Converted Policy's so-called "suicide clause" and leaves the respective rights and liabilities of the parties under the policy in a state of complete confusion. As stated by this court in *United States vs. Eagle Star Ins. Co.*, (9 Cir., 1953) 201 F.(2d) 764, 766:

“Had the insurance company deliberately set out to achieve obfuscation it could hardly have done a better job than was accomplished here.”

Under The Insurance Code of the State of Washington, an insurer may, in any life insurance policy, limit its liability to an amount not less than the full reserve of the policy and dividend additions thereto, in the event *only* of death occurring as a result of suicide of the insured *within two years from date of issue of the policy*. R.C.W. 48.23.260 (1) (b). The same time limit applies to incontestability. R.C.W. 48.23.050. In other words, under The Insurance Code, the *maximum* time during which the suicide exclusion may apply is two years from date of issue of the policy. This is a permissive exclusion and while the insurer may, of course, shorten the exclusionary period to, for instance, one month or one year from the date of issue, or omit the clause entirely, the insurer may not extend the period of the exclusion to in excess of two years from the date of issue of the policy. *Shank vs. Fidelity Mut. Life Ins. Co.*, (Minn., 1945) 21 N.W.(2d) 235; *Nordin vs. Commercial Casualty Ins. Co.*, (1934) 176 Wash. 59, 28 P.2d 259.

As appears from Exhibit A-5, entitled “Request for Change in Policy,” dated February 28, 1961, and the Pretrial Order herein (Pre. Tr. Or. Ad. Fact 5, Clk. R. 44-45), the Converted Policy (Ex. 2) was originally a term policy of life insurance and was converted, at Clark’s request, to a guaranteed equity policy, the principal amount of the insurance remaining the same. The original term policy was thereupon destroyed by the appellee (Rep. Tr. 9), but prior to such destruction there obviously was removed from the Original Policy and attached to the new Converted Policy a copy of the application for

the Original Policy (Ex. 1), dated December 1, 1959, antedating the date of the Converted Policy (March 8, 1961) by more than a year. There were also attached to the new Converted Policy certain other riders and endorsements, also obviously derived from the Original Policy, each of which antedate the new Converted Policy by many months. For instance, an examination of the new Converted Policy will show that the beneficiary named on the face thereof is the same beneficiary initially designated in Clark's written application (Ex. 1) for the Original Policy. However, a Change of Beneficiary form dated December 18, 1959, attached to the Converted Policy (Pre. Tr. Or. Ad. Fact 9, Clk. R. 46), served to change the named beneficiary under the Converted Policy from "Eleanor S. Clark, wife, etc." to Clark's "Executors, Administrators or Assigns." As the Original Policy has been destroyed (Pre. Tr. Or. Ad. Fact 5, Clk. R. 45) there is no way to ascertain whether all of the riders and endorsements of the Original Policy were attached to the Converted Policy. In any event, it is clear that neither the Original Policy nor a copy thereof was attached to the new Converted Policy. Under Part II hereof it is appellant's contention that the suicide clause as contained in the Converted Policy is incomplete in that the commencement date of the two-year period thereof is missing from the policy; that by reason of this omission, such suicide clause is so indefinite and vague as to be meaningless and of no force or effect whatever, or that, if such clause is capable of being construed and enforced, the construction most favorable to appellant requires the conclusion, as a matter of law, that the two-year period thereof commenced no later than December 1, 1959, the earliest

date of reference in the insurance transaction between Clark and the appellee.

It is a well established rule that when a policy of life insurance is renewed or converted under circumstances as in this case, the contract of insurance between the insured and the insurer is considered to be a single continuing contract for purposes of determining the commencement date of the suicide clause in the most recent policy; and the insurer may not utilize the date of issue or effective date of the most recent policy as such commencement date, for the purpose of establishing the defense of suicide. 29A *Am. Jur.* 298, *Insurance*, § 1151; *Annotation*: 110 A.L.R. 1139; *Silliman vs. International Life Ins. Co.*, (Tenn., 1915) 174 S.W. 1131; *Baugh vs. Metropolitan Life Ins. Co.* (Tenn., 1938) 117 S.W.2d 742; *Western & Southern Life Ins. Co. vs. Shelby*, (Ind., 1935) 194 N.E. 197; *Morse vs. Gen'l American Life Ins. Co.*, (Neb., 1935) 263 N.W. 676; *Massachusetts Mutual Life Ins. Co. vs. Thacher*, (1961) 222 N.Y.S. 2nd 339.

How, then, is the commencement date of the suicide clause in the most recent (converted) policy to be determined? As demonstrated above, the statutory rule of integration applying peculiarly to contracts of insurance precludes the *insurer* from introducing the initial policy or other extraneous documents (unattached to the converted policy) to establish the commencement date of the clause. Obviously, in such case, the insurer could establish such commencement date beyond question by attaching an appropriate endorsement to the converted policy. However, in this action, no such endorsement is attached to the Converted Policy. The *only* portion of the Original Policy which is

attached to the Converted Policy and which purports to deal, specifically, with the initial negotiations between Clark and the appellee under which the contract of insurance was effected, is the written application for insurance (Ex. 1) dated December 1, 1959. Simply stated, it is appellant's contention that the only logical purpose for removing that application from the Original Policy, destroying the Original Policy and then attaching such application to the Converted Policy, was to establish a date of reference from the Original Policy to the Converted Policy for the commencement of the two-year period of the suicide and incontestability clauses under the Converted Policy; and that, as a matter of law, the two-year period of the suicide clause in the Converted Policy commenced (by attached reference to the Original Policy) on December 1, 1959, more than two years prior to the date of Clark's suicide.

In the alternative, appellant also contends that the exclusionary suicide clause utilized by appellee in the Converted Policy violates The Insurance Code of the State of Washington and, accordingly, is illegal, void and unenforceable.

***The Trial Court's Findings of
Fact Are Erroneous Conclusions
of Law***

At the trial of this action, appellee's sole defense to appellant's claim for relief was the exclusionary suicide clause in the Converted Policy, which provides:

"If the insured shall die by suicide, whether sane or insane, *within two years of the date on which this policy became effective*, the liability of the Company hereunder shall be limited to a

return of the premiums paid." (Emphasis added)

In order to sustain this defense, appellee had the burden of proving by competent and admissible evidence that this policy exclusion was applicable to defeat or limit appellant's right of recovery. *Burrer vs. Mutual Life Ins. Co.*, (1963) 63 Wn.2d 266, 270, 387 P.2d 58. As stated in 29A *Am. Jur.* 918.

Insurance, § 1854:

" . . . an insurer seeking to defeat a claim because of an exception or limitation in the policy has the burden of proving that the loss . . . comes within the purview of the exception or limitation set up."

With the foregoing in mind, let us examine the Finds of Fact entered by the trial court (Clk. R. 62-64). In the oral opinion of the trial court, incorporated by reference as Finding of Fact VI (Rep. Tr. 22-24, Clk. R. 64), the trial court stated:

"In my opinion, making full allowance for the contentions of the Plaintiff, it is clear that as a result of the combination of the terms and *without reference to anything else*, Exhibit 2 being the converted policy, that the date of issue of the original policy and its effective date, in so far as the questions we are here concerned with, at the earliest was December 11, 1959." (Emphasis added)

Then, the trial court proceeded to find as matters of fact (i) in Finding of Fact 1 (Clk. R. 62) that a policy of term life insurance on Clark's life, No. 835,907, was "issued on the 11th day of December, 1959"; (ii) in Finding of Fact II (Clk. R. 62-63) that, in accordance with Clark's request, said policy of term insurance was converted and a Converted Policy was issued bearing date of March 8, 1961,

"effective December 11, 1960"; and (iii) in Finding of Fact V (Clk. R. 64):

"That by virtue of the combination of the terms and provisions contained within Exhibit 1 (Converted Policy No. 835,907) and without reference to anything else, the date of issue of the original policy and its effective date was fixed at December 11, 1959. The period of two years as provided in the aforesaid suicide clause commenced as of said date."

If we assume, as did the trial court in its oral opinion (Rep. Tr. 23), that the parol evidence rule is applicable and that the issues in question are to be determined by the terms and provisions of the Converted Policy and its attachments (Ex. 2), without reference to anything else, then it is obvious, appellant suggests, that the so-called Findings of Fact above referred to are not findings of fact at all but rather are conclusions of law which are not subject to the clearly erroneous rule of Rule 52 (a) of the Federal Rules of Civil Procedure. *Valley Construction Co. vs. Lake Hills Sewer District*, (1966) 67 W.D. 2d 902, 913, 410 P.2d 796; *Republic Pictures Corp. vs. Rogers*, (9 Cir., 1954) 213 F.2d 662, 664; *Cordovan Associates, Inc. vs. Dayton Rubber Company*, (6 Cir. 1961) 290 F.2d 858, 860. As stated by the Sixth Circuit Court of Appeals in *Cordovan*, 290 F.2d 858 at p. 860:

"The interpretation and construction of a written contract are matters of law within the competence of the Court of Appeals to review and do not come under the clearly erroneous rule."

Appellant further suggests, consequently, that this Court is not bound by the lower court's so-called Findings of Fact and may review the terms

and provisions of the Converted Policy, with its attachments, to determine whether, as a matter of law, the trial court was correct in concluding that under the terms and provisions of the Converted Policy, the commencement date of the suicide clause is fixed as December 11, 1959. In this regard, it is appellant's contention that there is no term or provision in the Converted Policy or its attachments to support this erroneous conclusion of law, and that the appellee failed to sustain its burden of proof on this issue.

Application of Established Rules of Construction to the Converted Policy Requires the Conclusion that the Two-Year Period of the Suicide Clause Commenced December 1, 1959.

Under the specific terms of the suicide clause in the Converted Policy, the two-year period in question commenced on "the date on which this policy became effective." That effective date is not, however, set forth or to be found within the four corners of the Converted Policy. In this vital respect the Converted Policy is incomplete and the meaning of the suicide clause is vague and uncertain. Accordingly, the missing date must either be supplied by judicial construction of the terms and provisions of the Converted Policy as in *Brun v. Northern Life Ins. Co.*, (1943) 16 Wn.2d 564, 570, 134 P.2d 84, or the exclusion must be held to be ineffective as a contractual limitation upon appellee's liability to appellant. *General American Casualty Company vs. Austin*, (E.D. Ark., 1954) 125 F.Supp. 721, 724.

Clark's suicide occurred on December 7, 1961. In the trial court *appellee* contended that, for purposes

of the suicide clause, the "date on which this policy became effective" was December 11, 1959 (four days less than two years of suicide) *or* December 18, 1959, (eleven days less than two years of suicide), *or* December 11, 1960, (in excess of a year less than two years of suicide). (Pre. Tr. Or. Def. Cont. 3, 4, 9, Clk. R. 53, 55). Insofar as is ascertainable from the Converted Policy, without reference to anything else, the significance, if any, of these respective dates appears to be as follows: In Paragraph 21 of the Converted Policy (Clk. R. 47) December 11, 1959, is referred to as the date on which the Original Policy was issued. December 18, 1959 is the date of two endorsements attached to the Converted Policy (Pre. Tr. Or., Ad. Facts 6, 7, Clk. R. 45), one of which served to change the named beneficiary of the Original Policy and the other of which changed the premium thereof to an annual premium. December 11, 1960 is referred to in an endorsement attached to the Converted Policy, dated February 28, 1961 (Pre. Tr. Or. Ad. Facts 8, Clk. R. 45), as the effective date of the conversion of the Original Policy to the Converted Policy and is also found on the face of the Converted Policy as the date from which its first policy year is to be computed.

As mentioned above, at page 26 hereof, the insurer may not rely upon or utilize the effective date of the conversion of the Converted Policy as the commencement date of the suicide clause. Consequently, the only remaining dates under the Converted Policy, which by reference to the Original Policy, remain for consideration are December 1, 1959 (the date of the application for insurance attached to the Converted Policy), December 11, 1959 (the date on which the Original Policy was "is-

sued") and December 18, 1959 (the date of the endorsements attached to the Converted Policy).

Neither of the two endorsements in question which served to change the named beneficiary and premium payment under the Original Policy, bears any reasonable relationship, inferentially or otherwise, to the "date on which this policy became effective" under the suicide clause of the Converted Policy. Therefore, December 18, 1959, insofar as appellant is aware, is without significance with respect to the issue before this Court. Thus, there remain but two dates for consideration, December 1, 1959, and December 11, 1959, the first of which would sustain the policy and appellant's recovery and the latter of which would serve to defeat the same.

In support of its contention that December 1, 1959, must be held to be the commencement date of the two-year period of the suicide clause, appellant relies upon the well established rule of construction that exclusionary clauses in insurance policies are to be strictly construed against the insurer and in favor of the insured. If the clause in question is susceptible of two or more constructions, that meaning and construction most favorable to the insured must be adopted by the court, *even though the insurer may have intended another meaning. Starr vs. Aetna Life Ins. Co.*, (1905) 41 Wash. 199, 203, 204, 83 Pac. 113; *Selective Etc. vs. General Cas. Co.*, (1956) 49 Wn.2d 347, 351, 352, 301 P.2d 535; *Brown vs. Underwriters at Lloyds*, (1958) 53 Wn.2d 142, 152, 332 P.2d 228; *Labberton vs. General Cas. Co.*, (1958) 53 Wn.2d 180, 182, 183, 332 P.2d 250; *Thompson vs. Ezzell*, (1963) 61 Wn.2d 685, 688, 379 P.2d 983; *Horwitz vs. New York Life Ins. Co.*, (9 Cir.,

1935) 80 F.2d 295, 298. The burden in such case is on the insurer to establish not only that the clause in question is susceptible of the construction sought by the insurer, but that it is the *only* construction which may fairly be adopted. *Steven vs. Fidelity and Cas. Co. of New York*, (Cal., 1962) 377 P.2d 284, 292.

Appellee has necessarily conceded the uncertainty of the meaning of the suicide clause in the Converted Policy by suggesting not less than three different dates for the clause; but appellee has ignored the construction most favorable to appellant. When, as here, the uncertainty has been clearly established, the construction most favorable to appellant must be adopted.

The insurer's attachment to the Converted Policy of the application for the Original Policy together with some if not all of its riders and endorsements, coupled with the declaration therein that it was issued in lieu of the Original Policy "which is hereby cancelled" (Pre. Tr. Or. Ad. Fact 10, Clk. R. 47) makes it clear that the reference in the suicide clause of the Converted Policy to the effective date of "this policy" was to some date of reference from the Original Policy, to be found in the attachments from the Original Policy. In other words, appellant does not, in this case, have to look to the Original Policy for this purpose, nor does it ask that this be done. To the contrary, appellant contends that, when the appellee destroyed the Original Policy and removed from it the application and certain of its riders and endorsements and attached them to the Converted Policy, appellee thereby incorporated within the Converted Policy the date of reference from the Original Policy to be utilized in the Converted Policy as the date of commencement of the

suicide clause; and that appellee, by this reference thereby made the date of the attached application the commencement date of the suicide clause.

In support of the foregoing conclusions, it is interesting to note that the Converted Policy sets forth as its beneficiary "Eleanor S. Clark, wife, if living, etc." One of the attached endorsements antedating the Converted Policy by more than a year, dated December 18, 1959, provides in part as follows:

"Change the beneficiary to executors, administrators or assigns of the insured."

Obviously, in attaching this endorsement, it was intended to change the beneficiary of the Converted Policy. In other words, the Converted Policy is treated for this purpose as if it had been in existence for more than a year prior to its date.

Why did not the appellee insurer attach the Original Policy to the Converted Policy? Why did it only attach the application and the other riders? If the Original Policy had been attached in its entirety it would have formed a part of the integrated contract and, presumably, furnished a specific date of reference for the suicide clause.

An examination of the Converted Policy demonstrates the evil inherent in this situation. If Clark, prior to suicide, had examined the Converted Policy in an attempt to determine when the two year suicide period would expire, he would have been unable to find a provision controlling that question. He did not have the Original Policy in his possession and there was no rider or endorsement attached to the Converted Policy that would shed any light on the issue. By reason of appellee's neglect and omission, he could not have determined his contractual rights

under the Converted Policy. Appellee, by its ineptness, created the problem and now seeks to benefit by it. The exclusion from liability could have been clearly stated and was not.

A somewhat similar factual situation was before this Court, in the case of *Horwitz vs. New York Life Ins. Co.*, (9 Cir., 1935) 80 F.2d 295. On January 6, 1933, an insurer commenced an action to cancel a policy of life and disability insurance. The question presented, among others, was whether or not the action had been commenced within two years "from its date of issue" within the meaning of the incontestability clause of the policy. The application, attached to the policy, was dated September 29, 1930. The policy was actually issued and dated January 7, 1931, and was delivered to the insured on January 14, 1931. The insurance company argued that the "date of issue" of the policy was January 7, 1931, within the two-year period in question. This Court rejected the argument of the insurer and held that for purposes of construing the incontestability clause, the policy's "date of issue" was September 29, 1930, the earliest possible date of reference under the policy. In reaching this conclusion, this Court noted, at page 298 of its opinion:

"The insurance company contends that if there be any ambiguity in the term 'after two years from its date of issue' the usual rule of interpretation of a policy's provisions favorable to the insured does not apply, because the statute and not the act of the company's draftsman causes the ambiguity. We hold this contention without merit because it is apparent that it would be a 'substantial' compliance with the statutory requirement if the company had avoided the ambiguity involved in the words 'date of issue' by following them with the

words, to-wit 'from the date of application,' or the 'aniversary date of the policy,' or 'from the date on which it is purported on its face, to be signed,' or, 'the date of its issuance and receipt by the insured.' *The ambiguity arises from the act of the draftsman in so framing the policy that, under conditions likely to arise, a question of construction also arises as to which of the four circumstances int he creation of the insurance contract fixes the 'date of issue.'* We therefore hold that in resolving the doubt, if any, caused by the drafting of the policy it should be resolved in favor of the insured." (Emphasis added)

A similar observation is particularly apropos of the Converted Policy. It is a converted policy, replacing a prior policy. The uncertainty or ambiguity arises from failure of the draftsman of the insurer, after converting the prior policy, to designate which of the four or five dates of reference in the creation of and conversion of the policy was to fix the "date on which this policy became effective" for purposes of the suicide clause. Resolution of this uncertainty in favor of the insured impels this Court to utilize for this purpose the earliest date of reference in the insurance transaction, which was December 1, 1959. *Narver vs. California State Life Ins. Co.*, (Cal., 1930) 294 Pac. 393, 395; *Brun vs. Northern Life Ins. Co.*, (1943) 16 Wn.2d 564, 570, 134 P.2d 84.

The Effective Date of an Insurance Policy Bears No Necessary Relationship to the Date of the Policy, the Date of Issue, the Date of Delivery or the Date of the First Premium Payment.

Neither the Converted Policy nor any of its attachments contains any provision which even re-

motely purports to establish or fix a date as of which the policy became effective for purposes of the suicide clause. This omission in and of itself constitutes a *per se* violation of R.C.W. Sec. 48.18.140(2) (d) which, as a matter of mandate, requires every policy of insurance to specify "The time at which the insurance thereunder takes effect . . ."

In this connection, Part 1 of the application dated December 1, 1959, (Ex. 1) attached to the Converted Policy, does contain a general negative statement as follows:

"(2) The policy applied for shall not take effect until it has been manually received and accepted by the owner and the first premium paid thereon, and it shall then be effective only if there has been no change in the insurability of the proposed insured subsequent to the completion of this application."

Based on this provision, appellee contends that since the Original Policy was not delivered until December 18, 1959, the Converted Policy could not have taken effect for purposes of the suicide clause prior to December 18, 1959. Neither the date of issue nor the date of delivery of the Original Policy is set forth within the four corners of the Converted Policy and, accordingly parol evidence of these dates is inadmissible under the rule of integration theretofore discussed. However, it is submitted that even if such evidence were admissible, the significant questions would remain. Why was the Original Policy destroyed? What was intended by the attachment of the application for the Original Policy to the Converted Policy? The interjection of the date of issue and/or the date of delivery of the Original

Policy serves only to add to the uncertainty and confusion as to the date from which the suicide clause was intended to run. In any event, appellee's argument on this point is contrary to the overwhelming weight of established authority. The effective date of an insurance policy bears no *necessary* relationship to the date of the policy, the date of its issue, the date of its delivery, or the date of its first premium payment.

The landmark case in this area, from whence this rule has emanated, is *Mutual Life Ins. Co. vs. Hurni Packing Co.*, 263 U. S. 167, 44 S.Ct. 90, 68 L.Ed. 235 (1923), wherein a policy of life insurance was applied for on September 2, 1915, issued on September 7, and delivered on September 13. At the request of the insured, the policy itself was dated August 23, 1915. The policy contained a clause making it incontestable after "two years shall have elapsed from its date of issue". The insured died on July 4, 1917, and an action contesting the policy was commenced by the insurer on August 24, 1917. The Supreme Court of the United States held, in favor of the insured that, for purposes of construing the incontestable clause, the "date of issue" of the policy was August 23, 1915, the earliest date of reference under the insurance transaction in question. The court observed that the word "date" as used in written instruments does not ordinarily refer to the actual time that an event took place, but rather a time given or specified or in some way fixed in the instrument itself. As stated by the Court (263 U. S. at 175):

"When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated

in the deed itself. The date of an item, or of a charge in a book account, is not necessarily the time when the article charged was, in fact, furnished, but simply the time given or set down in the account, in connection with such charge

. . . .

"Here the words referring to the written policy are 'from its date of issue.' While the question, it must be conceded, is not certainly free from reasonable doubt, yet, having in mind the rule first above stated, that in such case the doubt must be resolved in the way most favorable to the insured, we conclude that the words refer not to the time of the actual execution of the policy, or the time of its delivery, but to the date of issue as specified in the policy itself."

From the foregoing, the Court concluded (263 U.S. 176):

"It was within the power of the Insurance Company, if it meant otherwise, to say so in plain terms. Not having done so, it must accept the consequences resulting from the rule that the doubt for which its own lack of clearness was responsible must be resolved against it."

That the term "date on which this policy became effective" as used in the suicide clause of the Converted Policy is not necessarily synonymous with the date of the policy itself, was recognized in *Cantrell vs. Prudential Insurance Co.*, (1937) 189 Wash. 99, 63 P.2d 509. In *Cantrell*, the insured applied for a policy of life insurance on January 23, 1931, and thereafter, a policy was issued, dated February 16, 1931, containing a suicide clause limiting the liability of the insurer in the event of suicide within "one year from date hereof". The insured committed suicide on February 12, 1932. On appeal, a

judgment for the insurance company was affirmed, the Court holding that the date of the policy as therein stated, i.e., February 16, 1931, was controlling for purposes of the suicide clause as the meaning of the two words "date hereof" as therein utilized, was definite and certain. However, in passing, the Court did note, at page 102 of its opinion:

"Had the policy, in the case now before us, instead of using the words 'date hereof' used an expression such as 'date of issue' or 'date when the insurance became effective' a different question would be presented."

The so-called "different question" referred to in *Cantrell* was presented in *Schwartz vs. Northern Life Ins. Co.*, (9 Cir. 1928) 25 F. 2d 555, cert. den. 278 U.S. 628, 73 L.Ed. 547, 49 S.Ct. 29, wherein the question was whether the insured had committed suicide within one year from the date upon which the policy had become effective. In *Schwartz*, it was held that, for purposes of the suicide clause, the policy became effective on August 2, 1924, the date upon which the insurance was applied for and the insured took his medical examination, notwithstanding the fact that the policy was not issued, dated or delivered until August 14, 1924. This court rested its conclusion on the following rule, stated at page 557 of its opinion:

"The principal question presented in this case is upon what date the policy became effective. The appellant says it was August 2, 1924. The appellee says it was August 14, 1924. *The date from which a policy becomes effective is not necessarily determined by the date of which it bears or the date of its execution or the date of its delivery or by the date when the first premium is paid. It is the date from which the*

risk commenced, and it is determined by the meaning of the provisions of the insurance contract.” (Emphasis added)

Similarly, in *New York Life Ins. Co. vs. Cohen*, (N.D. Ohio, 1930) 48 F.2d 903, the application for insurance, attached to the policies in question, provided that the insurance applied for should not take effect unless and until the policies were delivered to and received by the applicant and the first premium thereon paid in full, and then only if the applicant had not consulted or been treated by any physician since his medical examination. The insurer, in an action to cancel the policies, argued that as the applicant had consulted a physician on July 19, 1928, and the policies had not been delivered until the next day, July 20th, they had not, by their terms, become effective. The Court construed the policy in favor of the insured and held that the policies had become effective in accordance with their terms on July 6, 1928, notwithstanding the provision in the application, stating at page 905:

“The condition of the application that the insurance shall not take effect unless the policies be delivered, and the first premiums paid during Cohen’s lifetime, is not inconsistent with anything in the policies. *It imports no time, and, so far as it was concerned, if delivery and the payments were made, the insurance would go into effect at any time agreed upon by the parties.*” (Emphasis added)

Thus, the fact that the existence of the insurance contract between the parties is expressly conditioned in the application upon delivery of the policy and payment of the premium does not establish the effective date of the insurance for purposes of the policy. As stated in *Cohen*, supra, at page 907:

"As there is a distinction between an insurance contract coming into existence, and the taking effect of the insurance provided for in the contract, there is no warrant to hold they mean the same thing; and such construction is not permissible."

This specific question was again presented in *Travelers Ins. Co. vs. Wolfe*, (6 Cir., 1935) 78 F.2d 78, cert. den. 296 U.S. 635, 80 L.Ed. 452, 56 S.Ct. 158. In that case, the application contained a provision similar to the one in the Converted Policy and the policy in question was not delivered to the insured nor the first premium paid thereon until October 20, 1927. The Court held, on a question of lapse of policy for non-payment of premiums, that notwithstanding such provision, the policy became effective on October 3, 1927, as stated in the policy itself.

In *Shira vs. New York Life Ins. Co.*, (10 Cir., 1937) 90 F.2d 953, the insured executed an application for insurance on October 28, 1929, containing a provision conditioning the insurance upon delivery of the policy and payment of the first premium. The insurer was unwilling to issue the policy applied for and on January 7, 1930, the insured executed an amended application as a result of which a policy, dated January 7, 1930, was issued and delivered on January 16, 1930. It was held that, notwithstanding the provision in the application, the policy became effective on January 2, 1930, in accordance with its terms, the court stating at page 955 of its opinion:

"The provision in the application does not fix the effective date of the insurance contract. It simply imposes a condition precedent to the taking effect of the insurance coverage."

As has been observed by several of the courts

presented with the question, only confusion and uncertainty could result from allowing parol evidence or testimony of delivery of a policy to establish any particular date affecting the respective rights of the parties under the policy. *Kurth vs. National Life & Accident Ins. Co.*, (Tex., 1935) 79 S.W.2d 338, 340; *Pladwell vs. Travelers' Ins. Co.*, (1928) 234 N.Y.S. 287, 291; *Reid vs. Bankers Life Co.*, (Neb., 1947) 28 N.W.2d 542, 547; *Sellars vs. Continental Life Ins. Co.*, (4 Cir., 1929) 30 F.2d 42, 44; *Cantey vs. Philadelphia Life Ins. Co.*, (S.C., 1932) 164 S.E. 609, 611. As stated in *Reid*, supra, at page 547:

"Varying reasons are given by courts adopting the majority rule, chief of which is that effective dates of policies and premium due dates should be definitely fixed by binding written contracts rather than determinable after loss at the caprice of parol testimony of doubtful veracity, thereby permitting the avoidance or destruction of plain contractual provisions and undermining their actuarial foundations, the fundamental basis of all insurance."

A like observation is found in *Cantey*, supra, at page 611:

"There must be a certainty in such dates, else there would be a controversy in every such case as this growing out of the uncertainty of the date of delivery of the policy. It might not be possible to prove the date of delivery; the agent and the insured both being dead. Then resort must be had to conjecture as in this case."

The evil inherent in any contrary rule is illustrated in *Allick vs. Columbian Protective Ass'n.*, (N.Y., 1945) 55 N.Y.S.2d 438, aff'd 64 N.E.2d 350, wherein an application for insurance contained a provision, as in this case, that the policy in question

was not to become effective until delivered to the insured in good health. Based upon this provision, the insurer argued, unsuccessfully, that since the insured was not in good health when the policy was delivered to her, the policy, including the incontestable clause, never became effective, notwithstanding the fact that the insured had paid and the insurer had accepted premiums beyond the period of incontestability.

The foregoing authorities establish beyond argument that the effective date of an insurance policy is not controlled by and bears no necessary relationship to the date of the policy, the date of its issuance, the date of its delivery or the date upon which the first premium was paid. This, appellant submits, is particularly true when, as here, the policy in question is a converted policy, containing riders and endorsements with several dates of reference relating to the insurance contract which antedate the policy itself. It necessarily follows, therefore, that there is no good reason for this Court, as a matter of construction, to utilize any date suggested by the appellee as the date upon which the Converted Policy became effective, to defeat the insurance coverage. To the contrary, established rules of construction require this Court to utilize as such effective date the earliest date of reference in the insurance transaction between Clark and the appellee, which was December 1, 1959.

Authority for such a determination is found in the case of *Brun vs. Northern Life Ins. Co.*, (1943) 16 Wn.2d 564, 134 P.2d 84. In *Brun*, the insured, in a single application, applied for a life policy and an accident policy and, at the time of application, paid the agent \$6.81 as the first monthly premium for

the two policies. The application provided "Annual Premium \$75.64 payable in twelve installments of \$6.81 each". Thereafter, on August 6, 1940, the policies in question were issued.

On October 8, 1940, the insurer wrote a letter to the insured, claiming past due premiums for the months of September and October of \$13.62; and, in response thereto, on October 9, 1940, the insured remitted a check to the insurer in the sum of \$6.81 with instruction to apply the same to the September installment. Thereafter, on November 28, 1940, the insured came to his death as the result of an accident.

In an action by the beneficiary to recover the face amount of the two policies, the insurer defended on the ground that the same had lapsed for non-payment of premiums. The insurer argued that as the premium payment due on October 1, 1940, had not been paid, the policies in question had lapsed upon the expiration of a grace period of 31 days thereafter. In other words, the insurer's argument arbitrarily assumed that the premium payments were due in advance on the first day of each month.

Preliminarily, the Court observed, at page 570 of its opinion:

"The provision in the application as to the times of payments of premiums is not ambiguous. It is, however, incomplete, in that it does not set forth a date in each month when the monthly installment of premiums shall be paid, and it is necessary that the court construe this provision."

The Court then rejected the insurer's arbitrary premise and concluded, at page 569 of its opinion:

" . . . that, as no time was provided as to the date of each monthly payment, the insured had

until the last day of each month within which to make the payment for that current month."

There is a marked similarity between *Brun* and the instant case. In this case, as in *Brun*, a date determinative of the rights of the parties is missing from the policy of insurance. In this case, as in *Brun*, the court has been requested by the insurer to arbitrarily supply as such missing date, a date which would defeat the insurance. In this case, as in *Brun*, the court should reject such request and, as a matter of construction, determine such missing date to be that date which, under the insurance transaction between the parties, is most favorable to the insured.

Based on the foregoing, appellant submits the *Brun* case as authority in support of its contention that, *for purposes of construing the suicide clause in the Converted Policy*, this court should determine that the Converted Policy became effective as of the date of Clark's written Application for insurance on December 1, 1959.

Appellant further submits that as Clark's suicide on December 7, 1961, occurred more than two years from such date of December 1, 1959, the Converted Policy suicide clause is inapplicable to restrict or limit appellee's liability to appellant for the full amount of the Converted Policy.

IN THE ALTERNATIVE APPELLANT SUBMITS
THAT THE SUICIDE CLAUSE OF THE
CONVERTED POLICY IS
UNENFORCEABLE UNDER THE INSURANCE
CODE OF THE STATE OF WASHINGTON

In the alternative, appellant submits that the suicide clause as contained in the Converted Policy

is completely unenforceable under The Insurance Code of the State of Washington.

Under The Insurance Code, no form of insurance policy may be issued or used in the State of Washington unless it has been filed with and approved by the Insurance Commissioner. R.C.W. Sec. 48.18.100(1). In turn, the Commissioner is under a duty to disapprove any form of policy which does not comply with The Insurance Code in any respect, or which contains any inconsistent, ambiguous or misleading clauses, or exceptions and conditions which unreasonably or deceptively affect the risk purported to be assumed in the general coverage of the contract. R.C.W. Sec. 48.18.110(1)(a)(c). As stated in *Kearns vs. Penn. Mutual Life Ins. Co.*, (1934) 178 Wash. 235, 34 P.2d 888, at page 247:

"It is the duty of the insurance commissioner to examine all forms of life insurance policies proposed to be issued in this state and to disapprove the use of any which are not in compliance with the statutory provisions for a standard life insurance policy."

The portions of The Insurance Code relating to such standard provisions are set forth in Appendix A hereof.

Specifically, with respect to the insurer's right to limit its liability in the event of suicide, R.C.W. 48.23.260 of The Insurance Code provides as follows, under the heading "Limitation of liability":

"(1) The insurer may in any life insurance policy * * * limit its liability to a determinable amount not less than the full reserve of the policy and of dividend additions thereto in event only of death occurring:

(a)

(b) As a result of suicide of the insured,

whether sane or insane, within two years from date of issue of the policy.

(c)

(2) An insurer may specify conditions pertaining to the items of subsection (1) of this section which in the commissioner's opinion are more favorable to the policyholder."

Under the foregoing statutes, it would appear clear that an insurer under a life insurance policy is allowed, *but is not required*, to limit its liability *only* in the event of death by suicide occurring "within two years from *date of issue* of the policy." It is equally as clear that the suicide clause employed by the appellee insurer in the Converted Policy does not conform to this permissive standard provision; that is to say, under the Converted Policy, the appellee purported to limit its liability in the event of suicide occurring (a) within two years of the *date on which this policy became effective*, rather than (b) within two years from the *date of issue of the policy*.

This departure from the statutory language in and of itself confuses the meaning of the Converted Policy suicide clause. As demonstrated in the foregoing sections hereof, the date of issue of a policy bears no necessary relationship to the date on which it may have become effective.

However, in such case there is a presumption that the Insurance Commissioner of the State of Washington properly discharged the duties of his office. 43 *Am. Jur.* 254, *Public Officers*, Sec. 511; 20 *Am. Jur.* 174, *Evidence*, Sec. 170. Accordingly, as the Insurance Commissioner approved the form of the Converted Policy (Ex. A-8), he must have determined in accordance with R.C.W. Sec. 48.23.260(2)

that its non-conforming suicide clause was more favorable to the insured than the standard form. *Kocak vs. Metropolitan Life Ins. Co.*, (N.Y., 1933) 263 N.Y.S. 283, 286. In fact, appellant submits that appellee is estopped from denying that the non-conforming suicide clause in the Converted Policy is more favorable to the insured than the standard form. *Ambrose vs. Acacia Mut. Life Ins. Co.*, (Va., 1949) 56 S.E.2d 372, 375. From this, it necessarily follows that, as suggested in the preceding sections hereof, the Converted Policy must be held to have become effective prior to its "date of issue". Appellant is entitled to the benefit of this most favorable construction of the non-conforming suicide clause and the appellee, as a matter of contract, is bound to such construction. *Kocak vs. Metropolitan Life Ins. Co.*, (N.Y., 1933) 263 N.Y.S. 283, 287; *American Atl. Ins. Co. vs. Tabor*, (Texas, 1921) 230 S.W. 397, 399; *Metropolitan Life Ins. Co. vs. Consento*, (Ill., 1938) 17 N.E.2d 1019, 1022; *Ambrose vs. Acacia Mut. Life Ins. Co.*, (Va., 1949) 56 S.E.2d 372, 375; *Monte vs. Yorkshire Ins. Co. of N.Y.*, (N.Y., 1957) 133 N.Y.S.2d 28; *Northern Life Ins. Co. vs. Christie*, (1934) 179 Wash. 88, 94, 36 P.2d 73; *Policyholder's Nat. Life Ins. Co. vs. Harding* (8 Cir., 1945) 147 F.2d 851. As stated in *Malanti vs. Metropolitan Life Ins. Co.*, (N.Y., 1926) 216 N.Y.S. 643, at 644:

"The policy here involved was the contract between the parties, and the defendant company saw fit to depart from the form prescribed by the Legislature. If the construction that I place upon the clause in the contract be correct, it inures to the benefit of the insured, and necessarily was an inducement to the insured to make the contract. If there be any ambiguity, that construction is to be adopted which is most

favorable to the insured * * * though that would not be so if the form prescribed by statute had been followed."

This line of authority, of course, buttresses appellant's initial argument that, as a matter of construction, the Converted Policy became effective for purposes of its suicide clause, on December 1, 1959.

If Appellee's Construction of the Converted Policy Is Adopted, Then the Entire Suicide Clause Is Illegal and Unenforceable.

However, even if we assume, solely for purposes of the argument, that, as contended by appellee (Pre. Tr. Ord. Def. Cont. 4, Clk. R. 53) the Converted Policy was not delivered and did not become effective until December 18, 1959, then, obviously, appellee's deliberate utilization of the date on which the policy became effective rather than its date of issue as the commencement date of the suicide clause served to extend such exclusion beyond the period permitted by the standard form. In other words under appellee's construction of the Converted Policy, the suicide exclusion would not expire until two years and seven days from the date of issue. Appellant submits, as an alternative argument herein that this renders the entire suicide exclusion illegal and unenforceable.

This particular issue is fairly unique. However it is well established (i) that an insurer may not broaden or extend any permissive standard exclusion to the detriment of the insured; *Shank vs. Fidelity Mut. Life Ins. Co.*, (Minn., 1945) 21 N.W.2d 235; *Onstad vs. State Mut. Life Assur. Co.*, (Minn.

948) 32 N.W.2d 185; *National Life & Casualty Co. vs. Blankenbiller*, (Ariz., 1961) 360 P.2d 1030, 1032; *Vordin vs. Commercial Casualty Ins. Co.*, (1934) 76 Wash. 59, 28 P.2d 259; and (ii) that the Insurance Commissioner has no power or authority to approve any policy provision which is less favorable to the insured than the statutory standard provision. *Shank vs. Fidelity Mut. Life Ins. Co.*, supra; *Onstad vs. State Mut. Life Assur. Co.*, supra; 29 Am. Jur. 71, 472, *Insurance*, Sec. 54. See also: *Massachusetts Mutual Life Ins. Co. vs. Thatcher*, (1961) 222 N.Y.S. 2d 339.

It necessarily follows with respect to suicide clauses in particular that, as stated by the Commentator in 9 A.L.R.2d 1436 at 1463:

" . . . a statute providing that suicide shall not be a defense in an action on a life insurance policy, *except in certain cases*, cannot be waived, being a part of the declared public policy of the enacting jurisdiction." (Emphasis added)

In support of this contention appellant relies, specifically, upon the case of *Shank vs. Fidelity Mut. Life Ins. Co.*, (Minn., 1945) 21 N.W.2d 235, which, although not concerned with suicide, does adopt the rule which appellant submits should be followed in this case.

In *Shank*, a 20-year Endowment policy was issued by an insurer to an airline pilot, containing an aviation exclusion providing:

" . . . that in the event of the death of the insured directly or indirectly as the result of *service, travel or flight* in any species of aircraft, except while riding as a fare-paying passenger in a licensed commercial aircraft * * * the liability of the Company to the beneficiary shall be limited to an amount equal to the re-

serve on this policy less any indebtedness hereon." (Emphasis added)

Under The Insurance Code of the State of Minnesota an insurer was authorized but not required when insuring the life of a person engaged in an extra hazardous occupation, to limit its liability to an amount not less than the policy reserve in the event of the insured's death through *service* in that occupation.

Thereafter, Shank met his death in a crash of his aircraft. In an action by his beneficiary to recover the face amount of the policy the trial court held that as Shank had met his death as a result of *service* in an aircraft the insurer's liability was limited to the policy reserve. The Supreme Court of Minnesota reversed and held that the insurer's attempt to extend the standard permissive exclusion, (death from *service*) to include death from travel or flight, was completely ineffective and served to void the entire exclusion. Initially, the Court observed (21 N.W.2d at p. 237):

"The effect of the insertion by Defendant of the unauthorized words 'travel or flight' in the rider or endorsement is the question which confronts us. Plaintiff argues that the words 'travel or flight' make the endorsement completely void, or contrary to the statutes of this State, and that she is therefore entitled to recover the face amount of the policy. In addition to claiming that the words '*service, travel or flight*' are ejusdem generis, Defendant contends that the

words are severable, and that, since death resulted from service, the endorsement is valid and the words 'travel or flight' mere surplusage that may and should be ignored."

The Court then specifically rejected defendant's contention and held that the insurer's attempt to expand the exclusion beyond the limits permitted by statute served to taint the entire exclusion in such manner as to render the same unenforceable. The Court directed entry of judgment for plaintiff in the full face amount of the policy, stating, at page 239 of its opinion:

"The rider was issued in violation of a legislative act which specifies the provisions which must be contained in a policy of life insurance. It therefore offended the public policy of this state. In our view, the entire rider or endorsement is tainted with illegality and is void."

For the reasons set forth in the *Shank* case, supra, appellant submits that the suicide clause utilized by appellee in the Converted Policy violated Sec. 8.23.260 (1) (b) of The Insurance Code of the State of Washington and was void *ab initio*. Cf: *Nordin vs. Commercial Casualty Ins. Co.*, (1934) 176 Wash. 2d 259, 28 P.2d 259. Appellee's liability to appellant for the full face amount of the Converted Policy should be enforced without regard to said ineffectual clause.

CONCLUSION

For the foregoing reasons and on the authorities cited, it is respectfully submitted that the Judge

ment of Dismissal (Clk. R. 66) heretofore entered should be reversed with directions to enter a judgment for appellant and against appellee in accordance with the prayer of appellant's Complaint (Clk. R. 4) in the sum of \$288,017.52, together with interest thereon.

Respectfully submitted,
GRAHAM, DUNN, JOHNSTON
& ROSENQUIST
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Attorneys for Appellant
Seattle-First National Bank

APPENDIX A

Provisions of the Insurance Code of the State of
Washington Relating to Standard Provisions
of Insurance Contracts

"R.C.W. 48.18.130 Standard provisions. (1) Insurance contracts shall contain such standard provisions as are required by the applicable chapters of this code pertaining to contracts of particular kinds of insurance. The commissioner may waive the required use of a particular standard provision in a particular insurance contract form if

(a) he finds such provision unnecessary for the protection of the insured, and inconsistent with the purposes of the contract, and

(b) the contract is otherwise approved by him.

(2) No insurance contract shall contain any provision inconsistent with or contradictory to any such standard provision used or required to be used, but the commissioner may * * * approve any provision which is in his opinion more favorable to the insured than the standard provision or optional standard provision otherwise required. No endorsement, rider, or other documents attached to such contract shall vary, extend, or in any respect conflict with any such standard provision, or with any modification thereof so approved by the commissioner as being more favorable to the insured.

(3) In lieu of the standard provision required by this code for contracts for particular kinds of insurance, substantially similar standard provisions required by the law of a foreign or alien insurer's domicile may be used when approved by the commissioner."

"R.C.W. 48.18.510 Validity of noncomplying forms.

Any insurance policy, rider, or endorsement hereafter issued and otherwise valid, which contain any condition or provision not in compliance with the requirements of this code, shall not be rendered invalid thereby, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this code.

“R.C.W. 48.23.020 Standard provisions required—
Life insurance. (1) No policy of life insurance * * shall be delivered or issued for delivery in this state unless it contains in substance all of the provisions required by RCW 48.23.030 to 48.23.130, inclusive”

“R.C.W. 48.23.050 Incontestability. There shall be a provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue, except for nonpayment of premiums”

APPENDIX B

Table of Exhibits

At the trial of this case on November 29, 1965, the following Exhibits were identified and offered in evidence by the appellant and the appellee and admitted in evidence by the trial court:

Exhibit

| No. | Description | Record |
|-----|--|--------|
| 1 | Part I and Part II of Application to The Crown Life Insurance Company to issue a policy of insurance in the amount of \$300,000 on the life of Charles M. Clark, dated December 1, 1959. | R.2 |

A3

| Exhibit No. | Description | Record |
|----------------|---|---------|
| 2 | Policy of Life Insurance No. 835,907 dated March 8, 1961, issued by The Crown Life Insurance Company insuring the life of Charles M. Clark in the sum of \$300,000, with attachments thereto. | R.2 |
| 3 | Life Insurance Trust Agreement dated August 18, 1961. | R.2 |
| 4 | Proof of Claim dated September 18, 1962, submitted by appellant to appellee for the death benefits under Exhibit 2. | R.2 |
| A-1 | Appellee's Master Record Sheet (Form 70 A-2), Policy No. 835,-907, on life of Charles M. Clark. | R.4-7 |
| A-2 | Appellee's Premium Card, Policy No. 835,907. | R.9-10 |
| A-3 | Change of Beneficiary Form, Policy No. 835,907, dated September 6, 1961. | R.15 |
| A-4 | Request for Change in Policy, Policy No. 835,907 dated May 16, 1961. | R.15-16 |
| A-5 | Request for Change in Policy, Policy No. 835,907, dated February 28, 1961. | R.16 |
| A-6 | Cancelled check dated December 18, 1959, drawn by Charles M. Clark and payable to the order of Crown Life Insurance Co., in the sum of \$3,586.50. | R.17 |
| A-7 | Certificate No. 18955 of Lee I. Kueckelhan, Insurance Commis- | R.21 |

| Exhibit No. | Description | Record |
|----------------|---|-------------------|
| | sioner of the State of Washington, re Policy Form H122 of The Crown Life Insurance Company. | |
| A-8 | Certificate No. 18958 of Lee I. Kueckelhan, Insurance Commissioner of the State of Washington, re Policy Form H162 of The Crown Life Insurance Company. | R.21-22 |
| A-9 | Duplicate copy of Original Policy No. 835,907, dated December 11, 1959. | R.10-14 |
| A-10 | Appellee's Cash Receipt dated December 18, 1959. | R.16-17, 20-21 |

CERTIFICATE OF ATTORNEY PREPARING OPENING BRIEF OF APPELLANT

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM R. SMITH
Attorney

No. 20744

**UNITED STATES
COURT OF APPEALS**
For the Ninth Circuit

SEATTLE-FIRST NATIONAL BANK, a National Banking
Association, as Trustee, *Appellant*,

vs.

THE CROWN LIFE INSURANCE COMPANY,
a Corporation, *Appellee*

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON SOUTHERN DIVISION**

HONORABLE GEORGE H. BOLDT
United States District Judge

BRIEF OF APPELLEE

PRESTON, THORGRIMSON, HOROWITZ,
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FEB 14 1967

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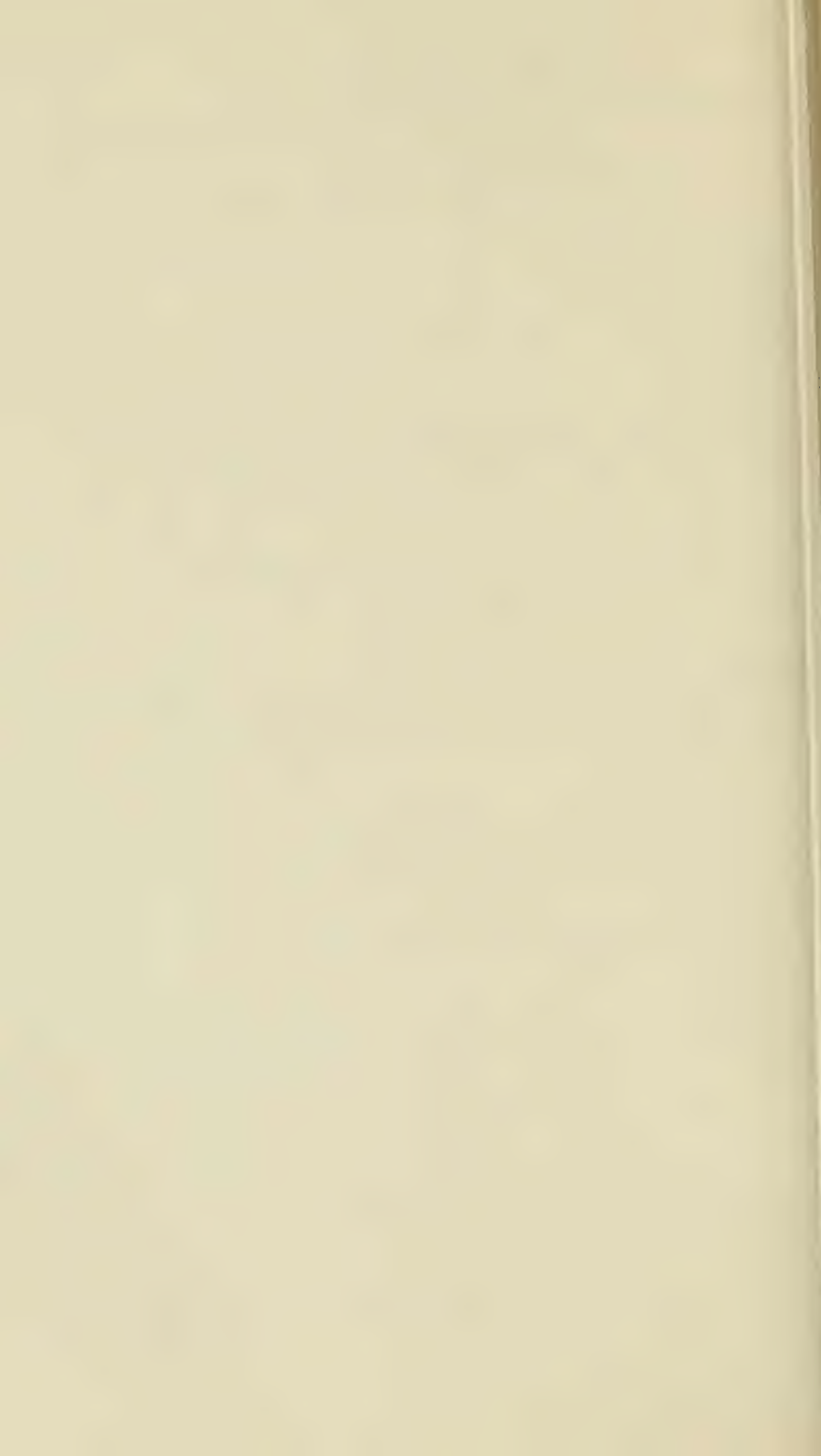
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UNITED STATES
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HONORABLE GEORGE H. BOLDT
United States District Judge

BRIEF OF APPELLEE

RESTATEMENT OF THE CASE

On December 1, 1959 Charles M. Clark applied in writing to the appellee for a policy of term insurance to age 65 in the amount of \$300,000 (Exhibit 1 R-2). No premium payment accompanied this application and no binding or other receipt was issued. In fact, the application stated in Paragraph 21 thereof:

“what amount was paid with this application?
\$ C.O.D.”

Said application also contained the following provisions:

“(2) The policy applied for shall not take effect until it has been manually received and accepted by the owner and the first premium paid thereon * * *.”

and

“(3) Acceptance by the owner of any policy issued on this application shall constitute approval of the provisions of the policy * * *.”

On December 11, 1959 (Exhibit A-9 R 10-14) appellee issued its 27-year term policy, No. 835907, in the amount of \$300,000 on the life of the said Charles M. Clark. On the front page thereof the following significant phrases appear:

“Expiry Date: The 11th day of December, 1986.
Premium: NINE HUNDRED AND FORTY . . . 97/100 DOLLARS payable in advance every three months, commencing on the 11th day of December, 1959 and terminating at the end of the 27th policy year or on the prior death of the insured.

Policy Years: Computed from the 11th day of December, 1959 which shall be the beginning of the first policy year.”

The policy was likewise dated the 11th day of December, 1959.

The said policy was delivered to Clark and the first premium paid on December 18, 1959. On that date, however, Clark changed the premium payments from quarterly to yearly by executing the following request (Attached to Exhibit R-2 Pretrial Order CLK R-3) on December 18, 1959:

“Re. Policy No. 835907. I hereby request and authorize the Crown Life Insurance Company to make the following alterations in the provisions of this policy, effective as from the 11 day of December, 1959:

"Change the premium to \$3,586.50 payable on the 11 day of December in each year."

At that time the first year's premium of \$3,586.50 was paid to appellee by check and the policy delivered to Clark (CLK R-60-61 Exhibit A-10 R 16-17 20-21).

While it may be true that appellant-beneficiary has never seen or examined the above described term policy, it was in the possession of the insured Clark from December 18, 1959 until surrendered in exchange for a converted policy on February 28, 1961.

On the latter date Clark executed a request for Change of Policy with respect to the term policy (Pretrial Order 45 CLK R 45-46, Exhibit A-5 R-16, also attached to Exhibit 2) reading in part as follows:

"Convert policy to Guaranteed Equity Plan, \$300,000, Annual Premium—Non Par effective 11, December, 1960."

"It is agreed that the original application and policy and this request shall be read and taken together, and shall together form the basis of the Contract."

Thereupon appellee issued to Clark a guaranteed equity 30-payment life non-participating policy bearing the same number as the term policy and in the same amount of \$300,000. (Exhibit 2 R-2) This policy was dated March 8, 1961 and further provided:

"Premium: \$8,344.50 during the first 26 policy years and \$7,021.50 during subsequent policy years, payable in advance every twelve months, commencing on the 11th day of December, 1960 and terminating at the end of the 30th

policy year or on the prior death of the insured. Policy Years: Computed from the 11th day of December, 1960 which shall be the beginning of the first policy year."

The original application (Exhibit 1 R-2) was also attached to this policy and Paragraph 21 of the converted policy reads:

"At the written request of the owner, copy of which is attached hereto and made a part hereof, this policy is issued in lieu of one bearing the same number *issued on the 11th day of December, 1959* which is hereby cancelled." (Emphasis supplied)

It will be noted that the request for Change of Premium effective December 11, 1959, the Request for Conversion of the policy effective December 11, 1960 and Paragraph 21 above quoted, all are in or attached to and form a part of the policy sued on and are thus "contained in the four-corners of said policy."

Both the term policy and the converted policy contained the identical suicide clause reading as follows,

"If the insured shall die by suicide, whether sane or insane within two years of the date on which this policy became effective, the liability of the Company hereunder shall be limited to a return of the premiums paid."

The suicide of the insured occurred December 7, 1961.

It should be noted that the only "date of reference" (using phrase which has been adopted by appellant but not found in any of the authorities), which is found anywhere in the converted policy and the documents attached thereto is December 11th.

APPELLEE'S ARGUMENT

In a87 .

In appellant's brief so many fallacious theories have been ascribed to us and so many words have been put in our mouths so to speak, that we think it well at this time to set forth again our contentions.

It is our contention that the suicide clause ran from the date on which the original term policy became effective which was its issue date of December 11, 1959. We did not and do not contend, as counsel suggests, that December 18, 1959, the date the policy was delivered, was the date such policy became effective. On the contrary, we contend that the provisions in the application that the policy did not take effect until it was delivered and the first premium paid merely held in abeyance and postponed the taking effect of the policy until those conditions were met and when they were met the policy became effective on the date of its issue, particularly, since this was the date the insurance began, as the cases generally hold. This is also in accord with the general rule of law that an insurance policy takes effect from its date of issue unless it be otherwise stated. *Wallace vs. World Fire & Marine Ins. Co.* (1947 Cal. D. Ct.) 70 Fed. Supp. 193 affirmed 166 Fed.2d 571 (9th Cir. C.) We did not and do not contend that the suicide clause ran from the date of the converted policy (December 11, 1960). We simply contend, that if appellant's argument that only the terms alone of the converted policy can be considered, was consistently followed, then everything, including the suicide clause, would run from December 11, 1960.

We contend arguendo that if an ambiguity existed as to the date from which the suicide clause

ran, it was proper to examine the intention of the parties as evidenced by their actions as to when the insurance began.

However, the trial court held (and we contend correctly) that the converted policy and its attachments and enclosures clearly made December 11, 1959 the date of issue of the original policy and the date it became effective. The enclosures referred to are:

(1) The request by Clark on December 18, 1959 to change the premium payment dates *effective from December 11, 1959* and to change the premium to \$3,586.50, payable on the *11th day of December in each year*.

(2) The request for conversion executed by Clark on February 18, 1961 requesting:

“convert policy to Guaranteed Equity Plan, \$300,000 Annual Premium—Non Par *effective 11, December, 1960.*”

(3) Paragraph 21 of the converted policy itself reads:

“At the written request of the owner, copy of which is attached hereto and made a part hereof, this policy is issued *in lieu* of one bearing the same number *issued on the 11th day of December, 1959* which is hereby cancelled.”
(Emphasis supplied)

We agree with appellant’s statement on page 26 of its brief that:

“It is a well established rule that when a policy of life insurance is renewed or converted under circumstances as in this case, the contract of insurance between the insured and the insurer is considered to be a single continuing contract for purposes of determining the com-

mencement date of the suicide clause in the most recent policy; and the insurer may not utilize the date of issue or effective date of the most recent policy as such commencement date, for the purpose of establishing the defense of suicide."

We contend that the suicide clause which reads:

"If the insurer shall die by suicide, while sane or insane, within two years from the date on which this policy became effective, the liability of the company hereunder shall be limited to a return of the premium paid"

and RCW 48.23.260 (Washington Insurance Code) permitting a life insurer to limit its liability in the event of the insured's suicide "within two years from date of issue of the policy," are not inconsistent as the issue date is the date the policy became effective. Not only is the general law to this effect, but the Washington State Insurance Commissioner's approval of the forms of policies containing the first quoted clause above, is certainly persuasive evidence of his like construction. (See Exhibits A-7 and A-8.)

We contend that the date of December 1, 1959 urged by appellant as being the date the insurance began and the suicide clause began to run was not and never was intended by the parties to be the effective date of this insurance. We urge this for the following reasons:

(a) No binder or other receipt was given at that time.

(b) There was no payment or part payment of premium either by cash or note, the application referring to the transaction as a "C.O.D." one.

(c) No insurance was ever asked for, provided

for, paid for, or was in the contemplation of the parties for any period prior to December 11, 1959.

(d) The anniversary date of the insurance is clearly December 11th.

AUTHORITIES IN SUPPORT OF APPELLEE'S CONTENTIONS

The transaction is covered by the Insurance Code of the State of Washington, RCW 48.01 et seq. The terms of the policy are governed by the provisions of the Insurance Code if there is any inconsistency between such terms and the provisions of the Code. There is no such inconsistency in the case at bar.

A.

The applicable sections of the code are as follows:
RCW 48.18.130 provides:

“(1) Insurance contracts shall contain such standard provisions as are required by the applicable chapters of this code pertaining to contracts of particular kinds of insurance. The commissioner may waive the required use of a particular standard provision in a particular insurance contract form if . . . (b) the contract is otherwise approved by him . . .

* * *

“(3) In lieu of the standard provisions required by this code for contracts for particular kinds of insurance, substantially similar standard provisions required by the law of a foreign or alien insurer's domicile may be used when approved by the commissioner.”

RCW 48.18.140 provides:

“. . . (2) A policy shall specify: . . . (d) the time at which the insurance thereunder takes effect and the period during which the insurance is to continue . . .”

(It should be observed that neither in this section nor in any other section of the code is there any requirement that the insurance contract recite the date of issuance of the policy.)

RCW 48.18.520 provides:

“Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended or modified by any rider, endorsement, or application attached to and made a part of the policy.”

RCW 48.23.020 provides:

“(1) No policy of life insurance other than industrial, group and pure endowments with or without return of premiums or of premiums and interest, shall be delivered or issued for delivery in this state unless it contains in substance all of the provisions required by RCW 48.23.030 to 48.23.130, inclusive. This provision shall not apply to annuity contracts.”

RCW 48.23.050 provides:

“There shall be a provision that the policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years from its date of issue, except for non-payment of premiums and except, at the option of the insurer, as to provisions relative to benefits in event of total and permanent disability and as to provisions which grant additional insurance specifically against accidental death.”

RCW 48.23.260 provides:

“*Limitation of Liability.* (1) The insurer may in any life insurance policy or annuity or pure endowment contract limit its liability to a determinable amount not less than the full reserve of the policy and of dividend additions thereto in event only of death occurring: . . .
(b) as a result of suicide of the insured,

whether sane or insane, within two years from the date of issue of the policy . . .”

B.

Both the date of issuance and the date the converted policy became effective relate back to the corresponding date of the original policy.

The rule is stated in Appleman on *Insurance*, Vol. 1 § 369, p. 690:

“Where protection is first afforded through means of a short term policy, the court will take the date of the first contract as controlling.”

Where from the terms of the policy it appears that the agreement between the insured and the insurer is that the new policy is a continuation of the old one, the date of the first policy is the controlling one. This rule has been uniformly applied by the courts. *Silliman v. International Life Ins. Co.* (Tenn) 174 S.W. 1131; *Western & Southern Ins. Co. v. Shelby* (Ind.) 194 N.E. 197; *Krebs v. Philadelphia Life Ins. Co.* (Pa.) 95 Atl. 91; *American Nat. Ins. Co. v. Thompson* (Tex.) 186 S.W. 254; *Sexton v. National Life Ins. Co.* (Colo.) 90 Pac. 58; *Wood v. Brotherhood of American Yeoman* (Iowa) 126 N.W. 949. The only exception is where the substituted policy is, in effect, a new and independent contract.

Although the suicide in the instant case occurred within two years of the date of the converted policy (which was December 11, 1960, as set forth on the face of the policy) it is clearly established by the authorities that the date of issuance and the effective date of the new, substituted or converted policy must be the date of issue and the date the original policy became effective. The suicide in this case

occurred well within two years of the date of issue of the converted policy and also well within two years of the date of issue of the original policy which must be considered as the date it became effective.

C.

The effective date or date of issue of an insurance policy insofar as it relates to a suicide clause in such policy must be that date which has been agreed to by the parties in the contract of insurance. This rule is clearly established by the decisions in the following cases: *Lloyd v. Franklin Life Ins. Co.* (9th Cir. 1957) 245 F.2d 896. There the application for life insurance was made December 6, 1952. The application requested that the policy be dated January 1, 1953, the insured paying premiums quarterly, commencing January 1, 1953. The date of the issuance of the policy was January 1, 1953. The insured committed suicide on Dec. 21, 1954. The policy provided that "if within two years from the date of issuance the insured . . . shall die by self-destruction, liability of the company shall be restricted to the amount of the premiums paid thereon." It appeared that, at the time of the application, the premium for a full month was paid by means of the delivery of a promissory note. The receipt further provided that the policy would be deemed effective as of the beginning of the first policy year as shown on such policy. The policy provided for the payment of premiums in accordance with rates in use by the company at the date of issuance. The application contained a special request that the policy be dated January 1, 1953. The plaintiff-beneficiary of the policy contended that it was rendered ambiguous (similar to the contention of the appellant in the

case at bar) by the inclusion of the application as part of the policy and delivery of the promisory note as payment for the premium for the first month, and that by reason of such ambiguity, the coverage commenced on the date of the medical examination which was December 11, 1952. It was alleged that dating the policy January 1, 1953, would have the effect of giving the company the benefit of the premium without any obligation on the part of the company for almost a month. The court found that there was no ambiguity in the insurance contract; that the claimed ambiguity was an attempt to suggest that the company's use of the words "January 1, 1953, which is the date of issue" and the words "First Policy Year Begins: January 1, 1953" were not sufficient to establish the date of issue. The court says:

"But every other clause of the policy application and receipt point unmistakably to January 1, 1953, as the date of issue. If the written document be taken altogether, there is no other date which could be the date of issue. The policy is therefore clear and unambiguous. The Company has a right to have the agreement enforced as written."

The court goes on to point out that even though it was a binding contract by reason of the payment of the premiums on December 11, 1952, it did not prevent the parties from postponing coverage and the date of issue until January 1, 1953, by express agreement, and the parties did have an express agreement to that effect. The court points out that all of the features of the policy dated from January 1, 1953—payment of premiums, grace periods, determination of age, loan value, cash surrender value, application for non-forfeiture and loan value

tables, mortgage redemption provisions, as well as the incontestible and suicide clauses. The court says:

"All of the cases that hold that the clauses of the policy refer not to the time of the actual execution of the policy or the time of its delivery, but to the date of issue specified in the policy itself. This is the day upon which, by agreement of the parties, the risk attached. Here the conduct of the company and the insured through the time from the application to the suicide of Lloyd was consistent with January 1, 1953, as date of issue. There was no ambiguity."

The case at bar is much stronger than the *Lloyd* case.

In the case at bar the application specifically recited that the insurance was not to become effective until the policy was manually delivered and accepted by the owner and the first premium paid thereon. No payment of premium accompanied the application. The application specifically provides that there was no amount paid with the application. The letters "C.O.D." which were inserted in the application indicated very clearly that the policy was to be delivered when the first premium should be paid.

In a dissenting opinion in the *Lloyd case*, Judge Healy took the position that the purpose of the suicide exclusion was to protect the insurer from one procuring insurance with the thought or intention of early suicide; that such purpose was achieved if the exclusion runs from the date of issue of the receipt of the first insurance premium. Judge Healy's dissent was based entirely upon the fact that the insured had paid the first premium on the policy at

the time of the application. It is clear as stated above that such a situation does not exist in the case at bar in that there was no premium receipt issued, there was no premium paid and the application by its terms expressly and unequivocally provided that there was to be *no insurance* until the policy was manually delivered and the premium paid.

The earlier case of *New York Life Ins. Co. v. Noonan* (9th Cir. 1954) 215 F.2d 905, involved an action upon a policy of life insurance containing a clause barring recovery of the principal sum if death by suicide should occur within a year of issuance of the policy. The application for the insurance was executed by the insured on June 15, 1951. For the purpose of giving the insured the benefit of a lower premium based on the insured's age, the application asked that the policy be written to take effect March 14, 1951. The policy issued contained a statement that the anniversary and insurance years were to be determined from March 14, 1951, the date as of which this policy should be deemed to take effect. Following this provision, the following appeared:

"In witness whereof the New York Life Insurance Company has caused this policy to be executed on June 22, 1951, which is its date of issue." It was held that there was no conflict or ambiguity; that the entire contract was set out in the policy and the application which was made a part of the contract. The court said that the policy was in effect from March 14, 1951, for "every purpose except the suicide and incontestability provision." The latter are on their face governed by the date of issue, which was specifically stated in the policy to be June 22, 1951; that the two dates March 14, 1951, and June

22, 1951, serve entirely different purposes, as is readily ascertainable from a reading of the instrument.

It is submitted that this decision clearly established the rule that the periods in relation to the suicide and incontestability provisions must be determined by what the parties themselves have agreed. In the case at bar it is very clear that the parties agreed that the date the policy became effective was certainly not earlier than the date fixed in the policy, namely December 11, 1959.

The same principle was applied by the court in *State Mutual Life Assur. Co. v. Stapp*, 72 F.2d 142. In that case it was held that where the suicide clause provided that "if the insured shall commit suicide within two years of the date hereof, sane or insane, this policy shall be null and void," the commencement of the policy was fixed as of the date on the face of the policy, notwithstanding the existence of a provision that the policy would not take effect until it was delivered and the first premium paid. In other words, the court adheres to the principle that the language of the policy is controlling with respect to the date upon which the suicide clause is to commence.

In the case of *Byrum v. Equitable Life Assurance Society of the U.S.*, 180 Fed. Supp. 620 (affirmed per curiam) 274 F.2d 822, it was held that where the insurer issued life policies relating back to the date of application, but date of issue stated in policies was a later date and insured committed suicide more than two years after the effective date but less than two years from the date of issue, the policies were in effect from the effective date for every

purpose except suicide and the incontestable provisions did not begin until date of issue, where the policy provided in so many words. The court specifically points out that such situation would not create any ambiguity, citing *inter alia*, *New York Life Ins. Co. v. Noonan* (9th Cir.—1954) 215 F.2d 905, and *Crowley v. Travelers Ins. Co.* (5th Cir.—1952) 196 F.2d 315, also citing *Forrest v. Mutual Benefit Life Ins. Co.*, 86 N.Y.S. 2d 910, affirmed 89 N.Y.S.2d 488. In the last cited case the suicide clause limited the liability of the insurer in the event of suicide within one year of the “date of issue.” The policy contained the words: “Date: 20 January 1947.” The court held that the date of issue was the date stated, notwithstanding that the application directed that the policy year should commence on July 20, 1946; that the policy provides that the policy year began July 20, 1946, and that the first premium was paid for the year ending July 20, 1947.

It should be borne in mind at all times that in the case at bar there was no difference between the date of the policy, the date of the policy years, the due date for payment of the first premium, or the anniversary date. These were all specified in the policy as December 11, 1959. No other date is mentioned.

In *Franklin Life Ins. v. Bieniek*, USCA 3rd Cir., 312 F.2d 365, the insuring defendant sued on a life insurance policy on the ground that the application included false material statements made with knowledge of their falsity on the part of the insured. The further provision that “after two years from date of issue, this policy shall be incontestable, except for failure to pay premiums,” was included in the policy. It became necessary to ascertain the

date of the issue of the policy. The policy did not define the date of issue as such. The heading of the policy contained the words:

“First Policy Year Begins March 13, 1958.

Expiry Date March 13, 1987.”

The first premium was paid at the beginning of the first policy year, March 13, 1958. Subsequent premiums were payable on the anniversary of said date in every year thereafter. The policy was issued by the company on March 21, 1958. The question was whether or not the March 13 or March 21 date was the applicable one. The court held that the intention of the parties was quite clear that the March 13 date was the applicable one, and that to apply the subsequent date would impart an artificiality to the acts of the parties that they never intended, citing *Lloyd v. Franklin Life Ins. Co.*, 245 F.2d 896, *supra*.

Here again it should be pointed out that in the case at bar the first premium was payable on December 11, 1959. The policy was computed from December 11, 1959; the expiry date which was twenty-seven years thereafter was specified as the 11th day of December, 1986; and the policy was dated December 11, 1959.

It is submitted that there is clearly no ambiguity and, therefore absolutely no ground for construction.

The principle established by the preceding cases was also following in the earlier case of *Davis v. Fidelity Mutual Life Ins. Co.*, CCA 4th Cir., 107 F.2d 150.

The decisions of the state courts have been uni-

formly the same: *Harrington v. Mutual Life Ins. Co.*, 131 N.W. 246 (N.D.); *Anderson v. Mutual Life Ins. Co.*, 130 Pac. 726 (Calif.); *Potts v. Metropolitan Life Ins. Co.*, 2 A.2d 879 (Pa.); *Kampf v. Franklin Life Ins. Co.*, 161 A.2d 717 (N.J.)

Under the rule which has been uniformly followed, where the policy fixes the date of issuance or the effective date, the terms of the policy must control. In the case at bar, there is no reference whatsoever to any other date than December 11, 1959, unless it be the actual date of the converted policy which was March 8, 1961, and the date of the beginning of the first policy year under the converted policy which was December 11, 1960. The suicide took place within two years of either date. Under Paragraph 21 of the converted policy it is specifically agreed "*at the written request of the owner, copy of which is attached hereto and made a part hereof, this policy is issued in lieu of one bearing the same number on the 11th day of December, 1959, which is hereby cancelled.*" The request referred to specifically recites that alteration was requested to "convert policy to guaranteed equity plan, \$300,000, Annual Premium—Non Par—Effective 11 December 1960." This request also contained the following:

"It is agreed that the original application and policy and this request shall be read and taken together, and shall together form the basis of the Contract."

Again, in a request made December 18, 1959, which is attached to the converted policy, the following appears:

"I hereby request and authorize The Crown Life Insurance Company to make the following

alterations in the provisions of this policy, effective as from the 11th day of December, 1959. Change the premium to \$3,586.50 payable on the 11th day of December in each year."

It is quite clear from all of the provisions of the document evidencing the contract between the insurer and the insured that the parties considered that the date of December 11, 1959, and of December 11 of succeeding years as the controlling date for all purposes. There is no ambiguity.

The fact that the statute RCW 48.23.260(1) (b) fixes the running of the two year suicide clause from the date of issue of the policy, while the policy provision refers to the date the policy became effective does not create any ambiguity or difficulty.

The Insurance Commissioner of the State of Washington approved Form H 122, the term policy, and Form H 162, the converted* policy (Exhibit A-7 and A-8). Both of these forms contain identical suicide clauses. Such approval by the Insurance Commissioner is a practical construction that for the purpose of the running of the suicide clause, the date the policy became effective and the issue date are the same. The significance of the Commissioner's approval is well illustrated in the case of *American National Ins. Co. v. Ingle*, 129 S.W.2d (Tex.) 426, where the court, in commenting on the effect of the Insurance Commissioner's approval of a policy form which differed from statutory requirements, said on p. 430:

"If, on proper construction of the policy provision, it remains doubtful whether it is in sub-

* RCW 48.18.130 (1) and (3) make provisions for such approval by the Insurance Commissioner.

stantial compliance with the statutes, that construction will be adopted which makes the contract conform to the requirements of the statute, rather than a construction that imputes an intent to disregard or violate the law, was held in *First Texas Prudential Ins. Co. v. Sorley*, (Tex. Civ. App.), 272 S.W. 346, 351."

The fact that the Insurance Commissioner has approved the use of the phrase "within two years of the date on which the policy became effective" in the suicide clauses of both policies indicates the consistency of the rules of the cases cited in this brief. The provision contained in the application that the policy shall not become effective until the first premium is paid and the policy is delivered establishes when the arrangement is to become a binding contract of insurance. When this is accomplished, the policy provisions as reconciled with the requirements of the statutes clearly establish, in this case, that the date the policy became effective and the issue date are the same, i.e., the date fixed on the policy which was December 11, 1959. This proposition is sustained by the authorities. *Rosenthal v. New York Life Ins. Co.*, 94 F.2d (8th Cir.) 675, and the annotations in 44 A.L.R.2d 472.

E.

The date of the application is neither relevant nor applicable.

There is nothing in the policy that was issued, nor in the application itself which could possibly lead to the conclusion that the date of issue of the policy or the date it became effective was the date of the application for insurance.

As pointed out above, the application by its ex-

press terms specifically states that the policy did not take effect until after payment of the premium and after the policy was manually delivered, which event took place on December 18, 1959. In *Pietruszynski v. Prudential Ins. Co. of America*, 203 N.E.2d 342 (Ill.), the court held that a life insurance policy took effect on the date stated therein and not on the date of the application for insurance, where no conditional receipt was given, where the application stated that it was to become a part of the policy and that in the absence of a conditional receipt, the insurance did not take effect until the policy was issued and the first premium was paid. There was a question as to whether or not the applicant for the insurance had paid a portion of the premium. However, the application contained the following question:

"12, a, Amount paid in advance? Answer: \$ C.O.D."

The policy also contained the following:

"Policy Date: April 7, 1961."

The insured was an infant who died on April 4, 1961. The court held that the insurance did not become effective at the time of the application in view of the fact that there was no premium paid or conditional receipt issued. The court points out that no amount was shown in answer to 12, a, merely the letters C.O.D.

The Supreme Court of the State of Washington has held that in the absence of a specific agreement, the insurance does not become effective merely because an application for such insurance is made. *Basinski v. National Casualty Co.*, 102 Wn.2d 101, 209 P.2d 1007. In that case the application for accident insurance provided that the application would not

be binding until accepted by the secretary at the home office. The payment of the first premium was made to the agent and the application and the premium were forwarded to an authorized representative of the company and the application was accepted. However, prior to the acceptance, the insured was injured.

The court held that the insurer was not obligated to pay benefits by reason of the injury which occurred prior to acceptance at the home office.

The court says:

“The application for the insurance and its acceptance would, under ordinary circumstances, constitute the contract. It will be observed that the application specifically provides that there is no contract made until it (the application) has been accepted by the secretary at the home office or by an agent duly authorized to issue policies. The testimony shows that the application was not accepted until after the respondent was injured, and the policy itself expressly states that it shall go into effect at a certain time, which was the day following the respondent’s injury. From these papers it is plain that at the time the respondent was injured, there was no contract between the parties. But respondent’s counsel orally argued that, when the application was accepted, a contract was made which related back to the time of making the application. If the proposition made by respondent had been unconditionally accepted, we would see much force in the argument, although there seems to be authority to the contrary. But here the only acceptance was that implied by the writing of the policy. That instrument expressly denies that the term of insurance shall begin at the date of the application, because it provides that it shall begin at

noon of the 27th day of October, which was two days after the making of the application and one day after the injury. The appellant had a right to thus conditionally accept the application."

In the case at bar there was clearly no contractual relationship created by the application. The very terms of the application negate any inference that the application created any obligation or assumption of duty by the insurer. There was no premium paid and no conditional receipt issued. There was nothing to infer that the coverage would relate back to the date of the application or that such date would be considered as the date of issuance of the policy.

ARGUMENT IN ANSWER TO THAT OF APPELLANT

Appellant's first assignment of error takes up the question of whether parol or extrinsic evidence was admissible to prove any term or provision of the insurance contract. Since the trial court found ample evidence in the converted policy and its attachments that the parties intended the insurance to be effective from December 11, 1959, the argument on this point seems to be academic. However, if there had been an ambiguity in the contract, we suggest that the trial court would have been justified under the law to consider such evidence in order to arrive at the intent of the parties.

Appellant argues that December 1, 1959, the date of application, should be adopted as the date on which the insurance clause began to run. Reference is continually made to the "earliest date of reference," which phrase appears nowhere in the policy

or endorsement and is apparently a product of counsel's mind. The proposition that an applicant with no premium deposit, who later accepted without question a policy dated December 11, 1959 and who asked that the premiums be paid as of that date, who asked that a converted policy bear the same anniversary date each year, of December 11, and who later accepted the converted policy which stated that it was issued in lieu of a like-numbered policy bearing the same number issued on December 11, 1959, should be deemed to have wished or understood the insurance coverage to begin from the date of his application is completely unsupported.

Appellant contends for December 1, 1959 as the date the insurance was effective by arguing that appellee attached the application to the converted policy (with the other endorsements from the term policy) in order to utilize the aforesaid date of December 1, 1959 in establishing a "date of reference" between the two policies. The obvious purpose of attaching the application to the converted policy was to comply with RCW 48.18.080 reading,

"Application as evidence. (1) No application for the issuance of any insurance policy or contract shall be admissible in evidence in any action relative to such policy or contract, unless a true copy of the application was attached to or otherwise made a part of the policy when issued and delivered. This provision shall not apply to policies or contracts of industrial life insurance."

Appellant contends that if December 18, 1959 was the date the term policy became effective (the reference to it as the converted policy on page 50 of appellant's brief is obviously a mistake) then the suicide clause ran two years and seven days from

date of issue of the policy and was illegal and again claims that it is our position and construction that December 18, 1959 was the date the insurance became effective, which again we deny. Appellant's claim of the illegality of the suicide clause used is that it thus broadens and extends the suicide clause to the detriment of the insured. Its claim in this respect is based entirely on accepting December 18, 1959 as the date the policy became effective as fixed by its terms but, this was not the date the policy became effective. The application merely said that the policy should not take effect until received and the first premium paid. It did not add, "and when so received and paid, the date of receipt and payment shall be the policy's effective date." Under the law set forth previously such provision merely held in abeyance and suspended the taking effect of the policy on the issue date of December 11, 1959, until such condition had been met. With this in mind, it is clear that the statutory provision,

"... as a result of suicide of the insured whether sane or insane within two years from the date of issue of the policy."

and the policy provision,

"... within two years of the date on which this policy became effective."

are not in conflict at all, the state of law being that a policy is effective from its date of issue, unless otherwise provided.

Note that the application does not say that the date of delivery and payment shall be the date the policy becomes effective, but merely attaches a condition to be complied with before the policy became effective on its issue date. Such is the general state of the law where, as here, the policy does not pro-

vide otherwise. Far different is the case of *Shank v. Fidelity Mutual Life Ins. Co.*, Minn. 1945, 21 N.W. 2d 235, relied on so strongly by appellant in this assignment. There the policy attempted to limit coverage in case of *air service, travel and flight* where the statute only allowed limited coverage in *air service*. The case is obviously correct, but not applicable here.

In this case, the words "the date on which this policy became effective" are not inherently favorable to the insurer. They can be equally favorable to the insured. Moreover, the language of the suicide clause must be read together with the other provisions of the policy. As demonstrated above, the policy provisions read as a whole clearly indicate that the parties to the contract understood that the words "the date on which the policy became effective" and "date of issue" were the same. Moreover, it clearly appears in the case at bar that the policy language was approved by the Insurance Commissioner of the State of Washington. In the cited case, the policy was merely filed but there was no indication of approval by the Insurance Commissioner.

APPELLANT'S AUTHORITIES

Horowitz v. New York Life Ins. Co., (9th Cir. 1935) 80 F.2d 295.

This case has no application to the facts in the case at bar. There the first year premium was paid with the application and the policy stated that the premium for twelve months was paid, that the policy took effect as of the 29th of September, 1930, which date was the anniversary of the policy, and that a like sum was due on said date every twelve

calendar months thereafter during the life of the insured. In addition, the application stated that the insurance should take effect and be in force from and after the time the application was made and whether the policy was delivered and received by the applicant or not. The policy was not actually signed or delivered to the applicant until January 7, 1931, and the court rightly denied the company the right to maintain a cancellation suit more than two years after September 29, 1930. The following excerpt from the court's opinion at page 299 is of extreme interest:

"This date of September 29, 1930, also appears in the policy as its 'anniversary' date which determines the applicant's then age and hence rate of premium. It fixes the day on which the future premiums are to be paid. It is a determining factor in the loan and surrender values and the dividend paying date. It determines the life of the policy itself if any premium is unpaid, for it starts the running of the days of grace before the insurance terminates.

"So far as any date is of importance, the 'anniversary' date is paramount. It determines every feature of the insurance contracted for that can be affected by a date. Insurance is the only purpose of the contract."

Significantly in the case at bar the anniversary date of both the term and the converted policy is December 11th.

Mutual Life Ins. Co. of New York v. Hurni Packing Co., 263 US 617, 44 Supreme Court 90, 68 Law Ed. 235 (1923) is of no help to appellant. There the policy was applied for on September 2, 1915, issued on September 7, 1915, and delivered on September

13, 1915, but dated at the request of the insured on August 23, 1915. The insurance company sued to rescind the policy but delayed doing this until August 24, 1917. The court correctly held that such a suit had to be begun two years after the issuance of the policy. In reaching this conclusion the court said:

“It was competent for the parties to agree that the effective date of the policy should be one prior to its actual execution or issue; and this, in our opinion, is what they did. Plainly their agreement was effective to govern the amount of the premiums and the time of their future payment, reducing the former and shortening the latter, and, in the absence of words evincing a contrary intent, we are unable to avoid the conclusion that it was likewise effective in respect of other provisions of the policy, including the one here in question.”

The case of *Cantrell v. Prudential Ins. Co.*, 189 Wash. 99, 63 P.2d 509, is of no aid to the appellant. There the court held that the “date hereof” in an insurance policy was unambiguous and started the running of the suicide clause. The significance of the court’s statement that had the

“Policy in the case now before us, instead of using the words ‘date hereof,’ used an expression such as ‘date of issue’ or ‘date when the insurance became effective,’ a different question would be presented,”

lies in the fact that the applicant paid the first monthly premium and in such case the application stated that the insurance should take effect as of *the date of the application*.

Schwartz v. Northern Life Ins. Co. (9th Cir 1928) 25 F.2d 555 is apparently relied on by appellant be-

cause of the statement therein to the effect that a policy of insurance becomes effective on the date the risk commences. We most certainly agree and point out that the term policy in the case at bar fixes December 11, 1959 as the beginning of the first policy year.

As for the facts in the *Schwartz* case, the appellant on August 2, 1924 signed an application for insurance and *paid* by note the first year's premium. On the same day he was examined and passed by the Company's medical examiner. A conditional binding receipt was issued, likewise dated August 2nd, stating the insurance should take effect when a satisfactory medical examination of the applicant had been made.

The policy itself was not issued and delivered until August 14, 1924, but the next premium had been set at August 2, 1925. As against the Company's contention that the suicide clause did not begin to run until August 14, 1924, the court said:

"From a consideration of all the provisions of the contract here in question, we reach the conclusion that the minds of the contracting parties met in fixing upon August 2, 1924, as the date from which the policy became effective and as the date upon which the risk commenced and the date from which began the year during which the policy might be contestable for suicide. It was for a year commencing with that date that the insured paid the premium, and August 2 was made the date of the payment of each annual premium thereafter and the date upon which the appellee's reinsurance in another company took effect."

The importance of the premium dates and periods covered thereby is well illustrated in *New York Life Insurance Co. v. Cohen*, (N.D. Ohio 1930) 48 F.2d

903, cited and quoted from by appellant. There the application was made June 28, 1928. The policy was dated July 6, 1928 and delivered July 20, 1928. The court in holding that the July 6 date governed, notwithstanding the provision that the insurance did not take effect until delivery of the policy and payment of the first premium, pointed out that the first premium period ended July 6, 1929, that the policy took effect July 6, 1928 and was dated July 6, 1928, and further emphasized that the insurance would go into effect at any time agreed on by the parties. Let us emphasize again that in the case at bar the date of December 11, 1959 was originally and continuously agreed upon by the parties as the date when the insurance went into effect.

The case of *Travelers Ins. Co. v. Wolfe*, (6th Cir. 1935) 78 F.2d 78, cited and quoted from by appellant, actually points up a situation like the academic question in the case at bar as to whether the insurance became effective on the issuance date of December 11, 1959 or the delivery date of December 18, 1959. In the cited case a five-year term policy was applied for on September 26, 1927. The policy was issued October 10, 1927 and delivered on October 20, 1927 and the premium paid by note. The policy also provided that it should be effective from October 3, 1927 while the application provided that the contract issued should not take effect until the first premium was paid. The question arose on whether the second year premium was timely paid within the second year grace period. The court in holding that the effective date of the contract was October 3, 1927 and that, therefore, the policy had lapsed for non-payment of premium, said on page 80:

"It is briefly the plaintiff's contention that the provision in the application, which is made a part of the policy, is controlling; that by its terms the insurance contract did not come into existence until the policy was executed and delivered and the first year's premium paid; that having contracted for a five-year term, no less period of protection can satisfy the insurer's obligation, and in any event there is a conflict between the application and the policy out of which an ambiguity arises, which under familiar principles must be resolved against the insurer, by whom the contract was drawn. We have given careful consideration to this contention, but as we read the contract it is perfectly clear. Its effective date is October 3, 1927. This is the date which controls the payment of premiums, and the running of suicide, incontestable, and other clauses. There is no conflict between this provision and the provision in the application. Read together, they mean that the contract shall not take effect unless the first premium is paid while the insured is in good health, but that when it does take effect it operates from the date stated therein. This is the ordinary connotation of the terms used, and we see no occasion for giving them a strained construction."

To the same effect is *Shira v. New York Life Ins. Co.*, (10th Cir. 1937) 90 F.2d 953 cited by appellant. Here again the beneficiary urged that the date of delivery of the policy controlled as against the agreed date of January 2, 1930. The court held to the contrary. In that case the policy provided that it should take effect on January 2, 1930. The policy was dated January 7, 1930 and was delivered on January 16, 1930. The application had the usual provision that the policy should not take effect until delivered. The beneficiary contended that either

the date of January 7, 1930 or the date of January 16, 1930 was the effective date of the policy so as to avoid a lapse for non-payment of premiums, but the court held otherwise, saying on page 955:

“The provision in the application does not fix the effective date of the insurance contract. It simply imposes a condition precedent to the taking effect of the insurance coverage. Furthermore, by an amendment to the application executed January 7th, the insured agreed that the insurance should take effect as of January 2, 1930. The language of the policy fixing the anniversary date and the date the policy should take effect is clear and unambiguous. Furthermore, the contract expressly provided that the initial premium would cover a period terminating on April 2, 1930 and that the insured should pay a like premium every three calendar months thereafter to maintain the policy. It is competent for parties to a life insurance contract to make such stipulations with reference to the effective date of the policy, the period which the initial premium payment shall cover and the times when the future premiums shall become due and such stipulations are binding on the parties. The condition in the application and the provision in the policy proper as to its effective date are not in conflict. When read together, they mean that the insurance coverage shall only take effect in the event the conditions specified in the application are fulfilled, and then as of January 2, 1930. *Travelers Ins. Co. v. Wolfe* (C.C.A. 6) 78 F.(2d) 78, 80 L.Ed. 452. We conclude therefore that the insured defaulted in the payment of a quarterly premium due on April 2, 1933.”

The case of *Allick v. Columbian Protective Association*, (N.Y. 1945) 55 N.Y.S. 2d 438, affd. 64 N.E. 2d 350, cited by appellant, is concerned solely with

the question as to whether or not under the New York Statute an incontestable clause was available to the insured and is not ever remotely applicable to the case at bar.

Finally, appellant apparently relies on *Brun v. Northern Life Insurance Co.*, (1943) 16 W2d 564, 134 P2d 84. The court in that case, by a 5 to 4 decision, held that a provision for premium payments a month in advance did not necessarily mean the first of each month and that such a provision permitted the payment on any day up to the last day of the month and that the grace period began to run after the last day of the month. The holding is entirely pointless as far as the case at bar is concerned.

SUMMARY

The appellant contends that the policy in issue was ambiguous as to the commencement date of the two-year period of the suicide clause, but this contention is not supported by the evidence in this case nor by the decisions of the courts which have considered the question. The evidence is clear that the earliest applicable date referred to in the insurance contract was December 11, 1959. The decisions of the courts are practically unanimous that the commencement date of the suicide period is the date to which the parties have agreed. In the instant case there is not only an express agreement as to the date of the original policy, there is a specific provision for the date as to which the premiums are to be calculated and the policy year is to commence. This date is clearly set forth as being December 11, 1959. It is submitted that on the basis of the criteria established by the evidence, the effective date and

date of issuance of the policy was December 11, 1959.

All of the above is contained in the writings attached to the converted policy, climaxed by Clause No. 21 thereof (virtually ignored in appellant's brief) reading:

"At the written request of the owner, copy of which is attached hereto and made a part hereof, this policy is issued in lieu of one bearing the same number *issued on the 11th day of December, 1959* which is hereby cancelled." (Emphasis supplied)

The judgment of the District Court was correct and should be affirmed.

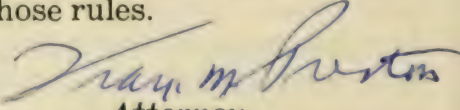
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CERTIFICATE OF ATTORNEY PREPARING BRIEF OF APPELLEE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


Attorney

No. 20744

UNITED STATES
COURT OF APPEALS

For the Ninth Circuit

SEATTLE-FIRST NATIONAL BANK, a National Banking
Association, As Trustee, *Appellant*,

vs.

THE CROWN LIFE INSURANCE COMPANY,
a Corporation, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT
United States District Judge

REPLY BRIEF OF APPELLANT

FILED

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HONORABLE GEORGE H. BOLDT
United States District Judge

REPLY BRIEF OF APPELLANT

PRELIMINARY STATEMENT

The issues in this proceeding have narrowed significantly. Appellee now concedes that neither the date of delivery of the Original Policy (December 18, 1959) nor the date of the beginning of the first policy year of the Converted Policy (December 11, 1960) constitutes the "date on which this policy became effective" under the suicide clause in the Converted Policy (App. Br. 5, 25). The reason for this concession is obvious. If this Court were to adopt either of said dates as the commencement

date of the suicide clause in the Converted Policy then, under any construction of the Converted Policy, the suicide clause therein would be extended beyond the two year period permitted under R.C.W. 48.23.260(1) (b), and rendered void and unenforceable. See: Opening Brief of Appellant, pp. 50-53.

This leaves for reply Appellee's sole remaining contention that:

"... the suicide clause ran from the date on which the original term policy became effective which was its issue date of December 11, 1959."
(App. Br. 5)

As will be demonstrated, this contention is unsupported by admissible evidence.

**There Is No Admissible Evidence In The
Record Before This Court To Support A
Finding Or Conclusion That The Two Year
Period Of The Suicide Clause Under The
Converted Policy Commenced On
December 11, 1959.**

A substantial portion of *Appellant's* Opening Brief was devoted to an argument, under Specification of Error No. 1, that parol testimony and documentary evidence extrinsic of the Converted Policy (Ex. 2) were inadmissible to supply or construe any term or provision of the Converted Policy's suicide clause (Appt. Br. 14-22). This argument was based on the statutory rule of integration of life insurance contracts as found in the Insurance Code of the State of Washington, and particularly R.C.W. 48.18.520, which provides as follows:

"Construction of Policies.

Every insurance contract shall be construed according to the entirety of its terms and con-

ditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement or application attached to and made a part of the policy."

Significantly, Appellee did not choose to answer this argument and, consequently, it is assumed that Appellee has conceded the merit thereof. In fact, on page 23 of its Brief, Appellee notes that:

"Since the trial court found ample evidence in the converted policy and its attachments that the parties intended the insurance to be effective from December 11, 1959, the argument on this point seems to be academic."

However, Appellee's entire argument is based upon the terms and provisions of Exhibit A-9 (App. Br. 2), which purports to be a specimen copy of the Original Policy issued by Appellee to Clark, reconstructed by Appellee from its internal business records approximately one week prior to trial (Rep. Tr. 11). Appellant's answer to this argument is simple. We are not concerned with the terms and provisions of any prior policy. We are concerned only with the terms and provisions of the Converted Policy. If Appellee had intended any of the terms and provisions of the prior Original Policy to be incorporated into the Converted Policy it could have accomplished this by attachment or endorsement. This Appellee failed to do. Consequently, Appellant submits again that the Trial Court erred in admitting in evidence Exhibit A-9 (the specimen copy of the Original Policy) and that, in determining the ultimate question on this appeal, i.e. the commencement date of the suicide clause under the Converted Policy, this Court should limit its inquiry to the four corners of the Converted Policy and wholly disregard the terms

and provisions of Exhibit A-9 (the specimen copy of the Original Policy).

Throughout Appellee's Brief (App. Br. 5-7, 11, 15-20, 24, 25, 30, 33) it is stated again and again, in one form or another, that, under the terms and provisions of the Converted Policy, it is clear that the Original Policy was dated December 11, 1959; that the "date of issue" of the Original Policy was December 11, 1959; that the first policy year of the Original Policy began on December 11, 1959; and that December 11, 1959 was the date on which the Original Policy became effective. In reply, Appellant submits that there is no term or provision in the Converted Policy which supports any one of these statements. The Converted Policy does not contain within its four corners any reference to or recitation of the date of the Original Policy, the "date of issue" of the Original Policy, the date of the beginning of the first policy year of the Original Policy or the date on which said Original Policy became effective. As these dates are not contained in the Converted Policy, they may not be utilized as the basis of a valid argument that the commencement date of the two year period of the suicide clause contained in the Converted Policy was December 11, 1959.

The sole specific reference to the Original Policy, contained in the Converted Policy, is found in paragraph 21 thereof, providing as follows:

"21. At the written request of the Owner, copy of which is attached hereto and made a part hereof, this policy is issued in lieu of one bearing the same number issued on the 11th day of December, 1959 which is hereby cancelled." (Ex 2, Clk. R. 54).

Appellee contends that this recitation in the Converted Policy necessarily establishes the "date of issue" and "effective date" of the Original Policy. This conclusion, Appellant submits, is completely non-sequitur. *The date upon which a policy of insurance may have been executed and issued does not establish its "date of issue" for purposes of determining the commencement date of the policy's suicide or incontestable clause. Anderson vs. Mutual Life Ins. Co., (Cal., 1913) 130 Pac. 726; Mutual Life Ins. Co. vs. Hurni Packing Co., 263 U.S. 167, 44 S. Ct. 90, 68 L. Ed. 235 (1923).*

In *Anderson*, supra, the life policy in question dated May 22, 1908, was actually executed and issued on July 6, 1908. It was held that, for purposes of determining the commencement date of the policy's suicide clause which commenced upon the policy's "date of issue", said date of issue was May 22, 1908. In *Hurni*, supra, the policy, dated August 23, 1915, was in fact executed and issued on September 7, 1915. The Supreme Court of the United States, speaking through Mr. Justice Sutherland held that for purposes of determining the commencement date of the incontestable clause in the policy, the "date of issue" of the policy was August 23, 1915, stating (263 U.S. at 175) :

"Here the words, referring to the written policy, are 'from its date of issue'. While the question, it must be conceded, is not certainly free from reasonable doubt, yet, having in mind the rule first above stated, that in such case the doubt must be resolved in the way most favorable to the insured, we conclude that the words refer not to the time of actual execution of the policy, or the time of its delivery, but to

the date of issue as specified in the policy itself."

Finally, the terms and provisions of the Converted Policy itself demonstrate the invalidity of Appellee's argument. Upon the face of the Converted Policy it appears that the policy was actually executed on March 8, 1961, yet the first annual premium date and the date of the beginning of the first policy year is stated to be December 11, 1960. This establishes, necessarily, that the date upon which a life policy was actually executed and issued is not determinative of its "date of issue" or "effective date" for purposes of determining the respective rights of the parties under the policy, particularly when, as here, the question is one of construction of a subsequent converted policy which does not contain within its terms either the date of execution, the date of the beginning of the first policy year or the effective date of the initial prior policy.

There is no term or provision within the four corners of the Converted Policy fixing the initial "effective date" of the prior Original Policy as of December 11, 1959 or, for that matter, as of any other date. Clearly, this hiatus is the fault of the Appellee insurer for, as stated by this Court in *Horwitz vs. New York Life Ins. Co.*, (9 Cir., 1935) 80 F. 2d 295, 298:

"The ambiguity arises from the act of the draftsman in so framing the policy that, under conditions likely to arise, a question of construction also arises as to which of the four circumstances in the creation of the insurance contract fixes the 'date of issue'. We therefore hold that in resolving the doubt, if any, caused by the drafting of the policy it should be resolved in favor of the insured."

As set forth in the Opening Brief of Appellant (Appt. Br. 30-46) the incomplete nature of the Converted Policy coupled with the rule of construction adopted by this Court in *Horwitz* should necessarily lead this Court to the conclusion that, for purposes of fixing the commencement date of the suicide clause in the Converted Policy, the earliest date of reference in the insurance transaction between Clark and the Appellee, appearing within the four corners of the Converted Policy (December 1, 1959) was the "date on which this policy became effective".

Appellee's Authorities Do Not Sustain Appellee's Contention

In support of its contention that the Original Policy (and derivatively the Converted Policy) became effective on December 11, 1959, Appellee relies in its Brief upon the well-established rule of law that:

"...the effective date or date of issue of an insurance policy insofar as it relates to a suicide clause in such policy must be that date which has been agreed to by the parties in the contract of insurance." (App. Br. 11)

This, of course, is a fundamental rule of mutual assent and, as stated by Appellee (App. Br. 11, 14) was recognized and correctly utilized by this Court in the cases of *Lloyd vs. Franklin Life Ins. Co.*, (9 Cir., 1957) 245 F. 2d 896 and *New York Life Ins. Co. vs. Noonan*, (9 Cir., 1954) 215 F. 2d 905. Similarly, the rule was correctly applied in the following additional decisions cited by Appellee: *State Mutual Life Assur. Co. vs. Stapp*, (7 Cir., 1934) 72 F. 2d 142; *Byram vs. Equitable Life Assurance Society*

of U. S., (W.D. La., 1959) 180 F. Supp. 620; *Forrest vs. Mutual Benefit Life Ins. Co.*, (1949) 86 N.Y. S. 2d 910, Aff'd, 89 N.Y. S. 2d 488; *Davis vs. Fidelity Mutual Life Ins. Co.*, (4 Cir., 1939) 107 F. 2d 150; *Franklin Life Insurance Company vs. Bieniek*, (3 Cir., 1962) 312 F. 2d 365; *Pietruszynski vs. Prudential Ins. Co. of America*, (Ill., 1964) 203 N.E. 2d 442.

In reply to this phase of Appellee's argument, Appellant submits that the rule of law noted above which was applied in each of the cited cases is inapplicable in the instant case. In the instant case the life policy before this Court for construction is a converted policy and, as conceded by Appellee:

"... it is clearly established by the authorities that the date of issuance and the effective date of the new, substituted or converted policy must be the date of issue and the date the original policy became effective." (App. Br. 10)

None of the cases cited by Appellee (of which *Lloyd* and *Noonan* are typical) involved a converted policy. In each of the cases cited by Appellee the commencement date of the suicide clause could be found within the four corners of the policy before the Court as a matter of reasonable construction. For example, in *Lloyd*, supra, the suicide clause ran from the "date of issue" of the policy. In the application for the policy it was agreed that the policy should be deemed effective as of the beginning of the first policy year and the insured specifically directed the company to date the policy January 1, 1953. Thereafter, the policy dated January 1, 1953 was issued and delivered to the insured, containing a provision "First Policy Year Begins: January 1, 1953." This Court held, and correctly so, that the

policy was clear and unambiguous and that the specific written terms of the policy established January 1, 1953 as its "date of issue". Similarly, in *Noonan*, supra, the suicide clause ran from the "date of issue" of the policy. In the policy itself, said "date of issue" was specifically stated to be June 22, 1951. This Court held that, notwithstanding the fact the policy may have become effective, in accordance with its terms, on March 14, 1951, the policy's "date of issue" was clearly June 22, 1951.

In Appellant's opinion, the distinction between cases such as *Lloyd* and *Noonan* and the instant case is clear. In the instant case there is no term or provision in the Converted Policy evidencing any mutual agreement or intention on the part of the parties to fix or establish the "effective date" of the Original Policy as December 11, 1959. In the instant case there is no admissible evidence before this Court with respect to which it can be reasonably concluded that the suicide clause in the Converted Policy commenced December 11, 1959. Any such conclusion would, necessarily, be based on mere speculation. It is not the function of this Court, acting under the guise of construction, to supply a missing term or provision to a policy exclusion which would serve to defeat the insured. As stated in 1 *Corbin on Contracts* (1963) Sec. 95, at page 394:

"A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have made a contract; they must have expressed their intentions in a manner that is capable of understanding. It is not even enough that they have actually agreed, if their expressions, when interpreted in the light of accompanying factors and

circumstances, are not such that the court can determine what the terms of that agreement are. Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract.”

Appellant submits that this fundamental rule of the law of contracts is applicable in the instant case; that as the effective date of the Original Policy is missing and cannot be found within the four corners of the Converted Policy, the suicide clause in the Converted Policy is incomplete and unenforceable.

As pointed out in Appellant’s Opening Brief, Appellee had the burden of establishing by a preponderance of *admissible* evidence an *enforceable* policy exclusion applicable herein to defeat Appellant’s recovery (Appt. Br. 15). Appellee has failed to sustain this burden of proof. Legally, the situation is as if no suicide clause at all were contained within the Converted Policy.

**The Insurance Commissioner’s Authority
To Waive The Required Use Of Standard
Provisions Under R.C.W. 48.18.130 Does
Not Extend To the Permissive Suicide
Clause Which Is Specifically Governed
By R.C.W. 48.23.260 (2)**

There is one further facet of Appellee’s Brief worthy of comment. In its Opening Brief Appellant noted that, in the Converted Policy, Appellee had departed from the standard suicide clause permitted under R.C.W. 48.23.260 (1)(b) and had attempted to limit its liability in the event of suicide

occurring within two years of the *date on which this policy became effective*, rather than within two years from *date of issue of the policy* (Appt. Br. 46-50). Appellant then argued that, as the Insurance Commissioner of the State of Washington had approved such departure (Ex. A-8), he must have determined, in accordance with R.C.W. 48.23.260(2), that the nonconforming clause was more favorable to the insured than the standard form (Appt. Br. 48-49).

Appellee's Brief does not contain any direct answer to this argument. However, Appellee does argue that the Commissioner's approval of Appellee's departure from the standard form is practical evidence of the fact that the "date of issue" and "date on which this policy became effective" are substantially similar or are one and the same (App. Br. 19-20).

Appellee's argument, Appellant submits, is based upon the erroneous assumption that, under R.C.W. 48.18.130 (1) (3) (set forth in incomplete and misleading fashion on page 8 of Appellee's Brief), the Insurance Commissioner is authorized to approve deviations from the standard suicide clause which are substantially similar to the standard clause. (App. Br. 19). This is not the case. R.C.W. 48.18.130, by its terms, is applicable only to "... such standard provisions as are *required* by the applicable chapters of this code pertaining to contracts of particular kinds of insurance." Under R.C.W. 48.23.020, pertaining particularly to life insurance, it is provided in pertinent part as follows:

*“Standard provisions required—
Life insurance.*

(1) No policy of life insurance . . . shall be delivered or issued for delivery in this state unless it contains in substance all of the provisions required by RCW 48.23.030 to 48.23.130, inclusive.”

The standard suicide clause, *permitted* under R.C.W. 48.23.260, is not one of the standard provisions *required* to be included in life insurance contracts under R.C.W. 48.23.020. Consequently, the standard suicide clause is not a *required* standard provision and is not governed by RCW 48.18.130.

As pointed out in Appellant’s Opening Brief (Appt. Br. 47-48), the subject matter of limitation of liability in life insurance policies in the event of death by suicide is governed by R.C.W. 48.23.260, which provides:

“(1) The insurer may in any life insurance policy * * * limit its liability to a determinable amount not less than the full reserve of the policy and of dividend additions thereto in event only of death occurring:

(a) . . .

(b) As a result of suicide of the insured, whether sane or insane, within two years from date of issue of the policy.

(c) . . .

(2) An insurer may specify conditions pertaining to the items of subsection (1) of this section which in the commissioner’s opinion are more favorable to the policyholder.”

Under this section of the Insurance Code it is clear that an insurer is *permitted* but not *required* to in-

clude a suicide clause in a life policy. The clause could be omitted entirely. However, if it is included as a limitation on the liability of the insurer, it must, as a matter of statutory mandate, conform to the standard clause specified in RCW 48.23.260 (1) (b) unless the insurer chooses to utilize a variation therefrom authorized under RCW 48.23.260 (2) which, in the opinion of the Insurance Commissioner, is more favorable to the policyholder.

Appellant submits, therefore, that RCW 48.18.130 is inapplicable to the nonconforming suicide clause utilized by the Appellee insurer in the Converted Policy and that, as the Insurance Commissioner approved said nonconforming clause (Ex. A-8), he must have determined, in accordance with RCW 48.23.260 (2) that said nonconforming clause was more favorable to the policyholder than the standard form. This necessarily refutes Appellee's argument that the "date of issue" and "effective date" under the Converted Policy were substantially similar or one and the same and lends significant support to Appellant's argument that Appellee's deviation from the standard suicide clause served to shorten the same.

CONCLUSION

Appellant again respectfully submits that the Judgment of Dismissal of the District Court should be reversed with directions to enter a judgment for Appellant and against the Appellee in the sum of \$288,017.52, together with interest thereon as provided by law.

Respectfully submitted,
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**CERTIFICATE OF ATTORNEY PREPARING REPLY
BRIEF OF APPELLANT**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM R. SMITH

Attorney

No. 20750

In the
United States Court of Appeals
For the Ninth Circuit

M.O.S. CORPORATION, *Plaintiff-Appellant*,

vs.

JOHN I. HAAS, INC., *Defendant-Respondent*

BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

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In the United States Court of Appeals
for the Ninth Circuit

No. 20750

M.O.S. CORPORATION, *Plaintiff-Appellant*,

vs.

JOHN I. HAAS, INC., *Defendant-Respondent*

BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

The findings and judgment from which this appeal is taken are found on pages 68-85 of the Transcript of Record.

JURISDICTION

The appellant—plaintiff below—is a corporation organized to do business in the State of Washington. The defendant-respondent is also authorized to do business in the State of Washington. This Court has jurisdiction in the present action because it arises under the Patent Laws of the United States (28 U.S.C. § 1338, 1391, 1400).

STATEMENT OF THE CASE

This case was before this Court as Case No. 18953. The issues tendered to the Court in that case were

whether or not the plaintiff was precluded from prosecuting this action by virtue of the doctrine of file wrapper estoppel. At the first trial of this cause it appeared that after the issuance of the patent in question, being patent No. 2,674,535 (Ex. 1), which was issued April 6, 1964, the inventor filed an application for reissue of the patent, which application was not timely filed. It was rejected by the Examiner upon two grounds, namely failure to file on time and on the further ground that the application contained *new matter*. The Trial Court at the conclusion of the first trial found that the doctrine of file wrapper estoppel applied and the plaintiff-appellant could proceed no further. This Court reversed, holding that the doctrine did not apply for the reason that, although the inventor, Sidney S. Meisler, in his application for reissue stated that the single drum application of his invention was omitted from the claims of the above-mentioned patent, being Exhibit 1 herein, by mistake and inadvertence, and that the double drum application of this patent disclosed in his patent and claimed in the patent was intended to, but did not cover the single-drum application, nevertheless this was a conclusion and not binding under the circumstances, and the question of infringement should be decided on the merits.

The patent in question relates to a method of preparing and packaging hops for shipment principally in the export trade. The testimony in the case established that

the hop industry in the Western states—where approximately 90 per cent of all hops produced in the United States are grown and 80 per cent of this in the Yakima Valley—was commenced about 1880 or 1890; that in the Western states the practice soon developed of baling the hops on the ranch, delivering the baled hops to the broker's warehouse or buyer's warehouse, from whence they were shipped to market. This market was largely within the confines of the United States due to the fact that hops thus baled could not be adequately protected when shipped abroad. The hops would acquire various odors from other materials which were either on board or had previously been shipped, thus contaminating the hops and rendering them undesirable from the standpoint of the buyer. (R. 63, et seq., prior case)

Commercial hops are the cone produced by the hop vine. The vines grow in open fields on trellises from 10 to 20 feet in height, and at the end of the growing season are harvested by cutting the vines near the ground and removing the vines together with their cones to a picking machine or to pickers from whence the cones are removed from the vines, either by hand or by machine, and placed in a building in large containers through which warm air is blown for the purpose of removing moisture. Dry hops come from these bins with a relatively small amount of moisture. The cones are to some extent shattered. In order to put the cones in a suitable condition for transportation they are

placed in burlap and mildly compressed with a pressure great enough to cause the leaves of the cone to adhere to one another but not enough to break the cells and expose the lupulin to the air. Exposure of the lupulin to the air causes its contamination and deterioration, rendering the product unfit for use. The lupulin is the essence of the hop cone of value in the brewing process. It serves two functions, it gives a flavor and it imparts a preservative quality to the brew. In the history of the beer industry or art no substitute has ever been found for the lupulin of the hop. As stated, the hop cone and the shattered leaves of the cone are mildly compressed in burlap wrapping at the ranch or farm. Historically it has been convenient for the farmer to create a package approximately 60 inches long by 20x30 inches, weighing approximately 200 pounds. Due to the varying amounts of moisture of the hops, of the particular block of hops from which the cones are taken, no one bale has an identical weight with any other bale. These bales are conveniently stored in warehouses in this oblong condition and because of this convenience the equipment of the farmers throughout the Western States has been uniformly devoted to the production of this type of bale. However, this particular type of bale, due to a lack of density occasioned by the press at the farm and due to the coarseness of the burlap wrapping permits the permeation of deleterious odors and dusts making it unsuitable for shipment abroad. (R. 63 et seq., prior case)

Down through the years various methods have been attempted in an effort to secure an economic package which could be shipped overseas so that the hops are impervious to the deleterious effects above described. None of these efforts have been successful until the Meisler invention, Exhibit 1, patent No. 2,674,535. An effort was made to prepare wooden boxes lined with lead, the size of the original farm bale, inserting the bale within the box and sealing the lid by hand-soldering. This proved impractical due to the expense and due to the difficulty of securing a perfect seal. Efforts were made to use paper bags and plastic bags without practical success, so that at the time of the Meisler invention there was very little trade abroad. With the advent of the Meisler invention, however, trade abroad has significantly increased and a substantial part of the production of hops is shipped abroad to South America, to the Orient and to Europe, utilizing the Meisler invention. (R. 150 et seq., prior case)

The Meisler invention, which has changed the economy of the hop industry, permitting the raising of substantially more hops in the Western States than had ever been raised before, consists of *recompressing* the farm bale to a specially formed elliptical or circular size so that the same can be inserted into standard steel containers. (R. 63 et seq., 115 et seq., prior case)

Claim 1, which is the claim involved here, reads as follows:

“A method for shipping hops comprising the steps of compressing at least *one bale of hops* of rectangular cross section into a *bale of circular cross section*, fastening the bale of circular cross section with spaced flexible members disposed transversely there around, placing the bale of circular cross section into two steel drums with the flanges around the open ends thereof superposed, and sealing the superposed flanges of *the drum*.

For a short period after issuance of the patent, the defendant-respondent, John I. Haas Inc., delivered hops to the plaintiff-appellant in the form of bales to be recompressed and sealed in standard steel drums. Part were re-delivered to the respondent, sealed in two drums, while part were sealed in so-called single drums (R. 86, 87, prior case). In the former case the two drums were sealed at their open ends while in the latter case a lid was applied. Subsequently the representatives of the defendant-respondent examined the operation of the press and the dies between the jaws of the press, and shortly thereafter began using identical dies, see Exhibit 2, without paying any royalty or pursuant to any royalty agreement with plaintiff, the holder of the Meisler patent, by assignment, Exhibit 63. Shortly thereafter this action was instituted, claiming infringement of Exhibit 1, Patent No. 2,674,535. (R. 82 et seq., prior case)

The Trial Court, at the conclusion of the first trial, in his oral opinion, which became the findings of fact by adoption, stated as follows (R. 501 et seq., prior case) :

“* * * were we interpreting the original patent as issued without reference to the reissue application, it might be permissible to construe Claim 1 as reading upon the accused package now used by Defendant. Unfortunately for the Plaintiff and Mr. Meisler, the patentee, it appears to me they have foreclosed a more liberal interpretation of this patent by virtue of said application for reissue wherein it was sought to broaden the language of the claims to include a single drum container. * * *

“The reissue application was rejected on the ground that it contained new matter.

“The patentee or his assignee did not appeal, although counsel for Plaintiff now indicates it may have been fruitless because of possible late filing.

* * *

“By failing to appeal * * * plaintiff, in my judgment, may not now contend that the claims of the original application and patent are susceptible of an interpretation that they cover single drum containers as well as two-drum containers.

“The doctrine of file wrapper estoppel seems applicable and controlling.”

This Court reversed the holding of the Trial Court as stated, and remanded the case for further proceedings, holding that the doctrine of file wrapper estoppel did not apply here, and that the issues tendered by the pleadings should be resolved on their merits without foreclosing the patentee from showing the broader ground covered by Claim 1 notwithstanding the doctrine of file wrapper estoppel. In other words, this Court held that the single drum application might well be an infringement of appellant's patent and the mere fact that the appellant had contended and stated and sworn under oath in the reissue application that the

original claim inadvertently did not cover the single drum application, the appellant was nevertheless entitled to show, which he did show, that that statement was merely a conclusion of his lawyer and did not constitute an admission of fact as to the single drum application. The Trial Court, upon the case being remanded and permitting the introduction of expert testimony concerning the issue involved, ultimately based his decision upon all of the evidence both in the first trial as well as the second trial. (Cause No. 18953)

In the testimony of Robert W. Beach, who testified as an expert, there is found a very clear statement of appellant's position. In qualifying himself Mr. Beach stated. (R. 44)

"I graduated from the University of Washington with the degree of B.S. in aeronautical engineering in 1932, thereafter attended the University of Washington Law School and graduated in 1936 with the degree of Juris Doctor. From May 1937 to February 1938 I was an Examiner in the United States Patent Office in Division 14 examining subclasses in Class 29 pertaining to processes relating to the manufacture of various special articles including automobile wheels, railroad car wheels, railroad tracks, jewelry, propellers, horseshoes and and other types of articles involving metal-working steps.

"From February 1938 to December 1939 I was patent counsel for Atlantic Casting and Engineering Corporation, Clifton, New Jersey.

"I have had * * * extensive practice in prosecuting patent and trademark applications before the United States Patent Office and the Patent Office Board of Appeals."

In analyzing the evidence in the case at bar Mr. Beach testified: (R. 46)

“In the case of an invention involving a combination, a patent will not be granted if the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains, as specified in the Statute 35 USC 103.

“In claims defining mechanical processes the manipulative steps are the important features of the claim rather than the apparatus used in performing the process. * * *

“I have had these factors in mind in considering the question of infringement of claim 1 of the Meisler patent 2,674,535 by the process used by the defendant.

“The process which the defendant in this action uses has been stated to involve the following steps:

‘Cutting a bale of hops generally midway between its ends into two parts,

‘Superimposing the two parts of the bale, each of which is of approximately square cross section in a press and, by the application of pressure by the press, recompressing the bale parts to approximately twice the density of the original bale and reforming the bale parts from stacked doublesquare cross section into a single circular cross section,

‘Bending the recompressed hops to retain the circular cross-sectional shape,

‘Placing the recompressed and banded package into a 55-gallon metal drum,

‘Sealing the cover on the drum end.’ * * *

“In considering the application of claim 1 of the Meisler patent quoted above to the process of the defendant described above, it should be noted that the claim is not limited to any particular type of

bale as long as it is of rectangular cross section. It could be a large bale or a small bale, a long bale or a short bale, a firm, compact, high-density bale or a looser, softer bale. The claim is not limited to use of any 'standard' bale or bale of any particular dimensions. Consequently, the 'bales' placed in the press by the defendant are 'bales' within the terms of the claim, even though such 'bales' may not have any wrapper on them and even though they may have been produced by cutting a larger bale to a smaller size. Such an additional step does not alter the character of the articles processed by the defendant as being 'bales' within the terms of claim 1 of the Meisler patent. The number of 'bales' used in producing the recompressed bale of the Meisler patent claim will depend upon the original density of the bales to be recompressed, the final density desired, the shape and size of cross section of the bale components being recompressed and the desired diameter of the resulting bale of circular cross section. * * *

"Claim 1 of the Meisler patent mentions the container as being composed of two steel drums having superposed flanges, but there is no description in the specification of the patent that the drums of which the container is made must be of special construction, but, on the contrary, it is desired to use 'standard' containers in the process.

"It should be noted that the process does not recite placing one end of the circular cross section bale in one container or drum and placing a second container or drum over the other end of the bale. It is simply required as a practical matter that the steel container of circular cross section be of a size in cross section to receive the recompressed bale and that the length of the container be sufficiently great to receive the bale. Whether the container is made in two parts of equal or in two parts of unequal length, even to the extent that one of such parts is simply a flat cover, is immaterial as far as the packaging process recited in the claim is concerned. The dimensions of the container, the number of parts

of which the container is made, the arrangement of the parts or what parts of the container are sealed have no bearing on the manipulative steps defined by the process claim 1. * * *

“The essential feature of the process defined in claim 1 of the Meisler patent is the densifying of the initial bale components by recompression and, during such recompression, conversion of the bale from a rectangular cross-sectional shape to one of circular cross-section. * * * Since the container in which the recompressed and reshaped bale is finally place for shipping purposes is conventional and the benefits of the process do not depend upon utilizing a container of any particular construction, the mention of two steel drums and drum flanges in the claim does not make such structural features limitations on the method defined by the claim.

“No claims of the Meisler patent application resulting in patent 2,674,535 specifying that the container should have a unitary cylindrical wall extending from end to end of the recompressed and reshaped hop bale was cancelled or restricted * * *. Even if the type of container recited in this claim should be considered a ‘limitation’, therefore, the container used in the defendant’s process should be interpreted as being the equivalent of the two-drum container recited in claim 1 of the Meisler patent in determining the question of infringement.”

Notwithstanding the foregoing clear statement that the single drum application of appellant’s invention is an infringement of the so-called double-drum application, the Trial Court held that the defendant-respondent’s process did not infringe or read upon the patent, Exhibit 1. The Trial Court did not hold the patent invalid although it was invited to do so by respondent. The findings signed by the Court were proposed by respondent (Tr. 64). An examination of these findings

indicates that the Trial Court did indirectly what this Court previously held that it should not do, namely, apply the doctrine of file wrapper estoppel. Thus in the findings we note the following:

"XIX. On May 18, 1956, Meisler, after conferring with his attorney, and with the consent of the plaintiff, M.O.S. Corporation, filed an application for reissue of his patent. The reissue application included claims 1-9 of the patent, and a new claim 10, broadening the last two steps of claim 1 in the following language:

'placing the bale of circular cross section into at least on drum and sealing said drum.'

The specification was broadened similarly by stating the bale was hermetically sealed 'in one or two steel drums' instead of 'in two standard steel drums' (Exhibit 14).

"XX. In the Oath accompanying the application for reissue, the patentee, Meisler, said:

"* * * I verily believe the original patent to be partly inoperative or invalid for the reason that the original patent describes my invention as a combination of a method of compressing hops with the step of placing a bale into two steel drums, while actually one steel drum can be used in place of two steel drums without affecting the scope of my invention.

"XXI. The reissue application was rejected on October 19, 1958. The examiner held the application to be defective 'in that new matter has been introduced into the case * * * wherein the terms "one or" have been inserted. No reference was made in the original specification or claims to the use of one drum for shipping hops.' (Exhibit 14, page 20).

"XXII. On September 13, 1956, Meisler, by his counsel, requested reconsideration of the examiner's rejection of the reissue application and urged

that 'the original application contains data from which it is apparent that two drums can be used in lieu of one drum,' and that 'the use of one or two drums is inherent in the original specification' (Exhibit 14, page 22.

"XXIII. On October 19, 1958, the examiner rejected Meisler's reissue application. Thereafter, Meisler abandoned the reissue application."

It is evident from the foregoing that the Trial Court was still being influenced by the doctrine of file wrapper estoppel and did not examine the claim on its merits as directed by this Court, but relied heavily on the legal conclusions prepared by his attorney and signed by Meisler in connection with his reissue application. While the conclusions contained in the file wrapper are aids, they, of course, should not take the place of physical facts to the contrary. It would seem that the initial comment of the Trial Court at the conclusion of the first trial, namely that the process of the defendant could be construed to read upon appellant's claim 1 but for the doctrine of file wrapper estoppel has not truly been abandoned by the Trial Court--thus indirectly applying the doctrine.

QUESTIONS PRESENTED

Did the method of recompressing hops from rectangular bales to bales circular in form, inserting same in a standard steel drum and sealing same with a lid, infringe upon the process claimed in Exhibit 1?

SPECIFICATION OF ERRORS

1.

The court erred in entering its judgment of dismissal (R. 85) and its order denying motion for new trial (R. 86-89).

2.

The court erred in entering its memorandum decision, including findings of fact and conclusions of law (R. 68).

3.

The court erred in holding that the respondent's process of packaging hops did not infringe upon appellant's patent (R. 84).

4.

The court erred in finding that the file wrapper history showed that it was the intention of both the applicant and the examiner that the double drum process was essential to appellant's patent, Exhibit 1 (R. 73, 74).

5.

The court erred in holding that the appellant's patent, Exhibit 1, was preceded by many patents in the field and that therefore it occupied a narrow "crevasse" (R. 72).

6.

The court erred in holding that respondent's single drum process with the added net weight feature did not utilize the steps of appellant's process patent or

method patent and therefore did not infringe same (R. 82, 83).

7.

The court erred in holding that the doctrine of equivalence did not apply to protect appellant's patent against the method of respondent (R. 87).

8.

The court erred in entering findings of fact 9, 12, 14, 15, 16, 21, 22, 25, 26, 27, 28, 29, 32, 33, 34 (R. 77-83), and conclusions of law 3, 4, 5 and 6 (R. 84).

The foregoing specification of errors are predicated upon the following grounds and reasons:

1. The prior art does not narrow the scope of Claim 1 of the patent, Exhibit 1.

2. The file wrapper history does not show that the appellant's method is limited to the use of two drums.

3. The application for reissue and the file wrapper history thereof does not show that the appellant admitted that the scope of its patent was limited to the use of two drums.

4. The essential steps in appellant's patent are included in respondent's process, and therefore there is infringement, even though respondent's process may be less efficient or have added features, i.e., net weight.

5. Respondent's process is the equivalent of appellant's patent.

6. Respondent's process infringes appellant's patent, Ex. 1.

INTRODUCTION

Each of the grounds above cited is applicable to each of the specifications of error and all relate to the basic question whether or not the so-called single drum net weight process of the respondent infringes appellant's patent. Therefore, rather than duplicate the argument in support of each specification of error, it is stated at this point that each of the following subdivisions of argument is applicable to each specification of error. As pointed out hereinafter, the question involved here is the interpretation of Claim 1 of the patent. Under the cases hereinafter cited this is a question of law. Although we disagree with a number of the findings of fact, this relates primarily to the question of the scope of the claim, and under the authorities are reviewable by this court.

ARGUMENT

I

The Scope of the Patent

As set forth above, the patent, Exhibit 1, herein involved was applied for on July 13, 1951 and was issued on April 6, 1954. The claim involved in this controversy is Claim I thereof which reads as follows:

"A method for shipping hops comprising the steps of compressing at least *one bale of hops* of rectangular cross section into a bale of circular cross section, fastening the bale of circular cross section with spaced flexible members disposed transversely therearound, placing the bale of circular cross section into two steel drums with the

flanges around the open ends thereof superposed, and sealing the superposed flanges of *the drum*." (Italics supplied)

It is the contention of the appellant that this claim does not limit the process patented to the so-called double drum application illustrated in the specifications. As a matter of fact, the last paragraph of the specifications clearly indicates to the contrary. For there it is stated:

"It is obvious that the method and means illustrated and described herein are subject to many variations and modifications within the scope of the appended claims." (Ex. 1)

It is also significant, we submit, that Claim I refers to utilizing "at least one bale of hops" and that in sealing it is "the superposed flanges of *the drum* that are sealed. As a matter of fact, the degree of compression described in the specifications would clearly dictate the use of a *single drum* with the use of *one bale* of hops, as described in Claim I. (See line 2, column 3 of the specifications (Ex. 1) in which the volume of the bale is indicated to be reduced to 14.5 cu. ft. from the original size of 60x22x30 inches of each original bale which by computation is approximately 22 or 23 cu. ft.) Therefore, Claim I clearly contemplates the use of one as well as two or more drums.

It is, we submit, of significance that the original Claim I included in the original application for patent was never withdrawn or modified in order to secure the issuance of the patent (Ex. 14A). As revealed by

the file wrapper, the Examiner in acting on the original application rejected Claim I as he rejected all claims of the original application. This, of course, under Patent Office practice does not constitute a rule or decision in the judicial sense but merely the contention of one opposing the issuance of patent. (The Examiner thus occupies two positions, that of an adversary resisting the issuance of a patent and finally the judge ruling as to whether the patent should issue or not. It is the final action of the Examiner that constitutes what may be described as a judicial process. His actions prior to that time are necessarily that of an adversary.) After this rejection, it is interesting to note, that the attorney for the applicant responded with rather a short letter, subsequent to which Claim I was allowed. The Trial Court adverted to a portion of the file wrapper in arriving at its conclusion; but we wish to call your Honor's attention to the following:—

The court in its findings after commenting that Claim I had been rejected initially on the grounds that it was old in the art of packaging hops by vacuumizing the containers and admitting an inert gas and that it was found to be immaterial whatever shape the hops were pressed into and that it made no difference whether the container was sealed in the center or the end, stated that the applicant, through his attorney, nevertheless redrafted Claims 9 and 10 and in response to Examiner's rejection of Claim I asked that he reconsider his statement that "it is immaterial what shape

the hops are pressed into" since an important part of "applicant's inventive conception is to be found in the fact that two ordinary rectangular bales of hops are compressed into a single rectangular bale* * *." The court went on to say that the Examiner paid heed to these representations of the applicant in accepting Claims 1 to 5 (R. 73). We think that the remark of the applicant's attorneys of real significance and the one that caused the claim to be allowed was the comment that the *prior art disclosed by Schoonmaker did not anticipate the idea of this patent*. The applicant's attorney stated the following (Ex. 14-A, p. 18) :

"The container of Schoonmaker is a single rectangular container as compared with applicant's *conventional drums*, and the container of Passarelli is a single drum of *other than conventional design* as compared with applicant's *conventional drums* secured end on end."

It is evident that the Schoonmaker container was rectangular and the Passarelli container was a drum of other than conventional design compared with applicant's conventional drums.

Furthermore, the entire paragraph, a portion of which only is set forth by the Trial Court, reads as follows (Ex. 14-A, 17, 18) :

"The Examiner is further requested to reconsider the statement that it is immaterial what shape the hops are pressed into since an important part of applicant's concept is to be found in the fact that two rectangular bales of hops are pressed into a single circular bale, *the diameter of which is always uniform so that it can be readily used with any of the steel drums found in the open market*.

However, applicant has disclosed a way for the elimination of the known custom built metal lined goods for shipping hops which substantially reduces the cost of packaging, storing and shipping". (The italicized words were omitted in the court's findings). (R. 73)

The applicant's attorney was thus — as any good lawyer should—basing his contention on a number of valid propositions. It is clear that the inventive idea relates directly to the results to be achieved; namely, the elimination of the expensive lead lined boxes and the utilization of an inexpensive standard container. Thus, it was necessary to conform the existing bale as it came from the farm to the size of such readily available container. The Examiner himself did not specify upon which ground he was allowing Claim I. Certainly he said nothing to indicate that he was allowing it on the ground that a double drum was something new and different and unobvious. The thing that was new, different and unobvious here and which became commercially successful was the idea of recompressing the unique Western farm bale into a circular form to an extent and manner not to damage the hops or expose the lupulin to the oxidizing effect of the air and to arrive at a shape easily packaged and sealed in existing conventional containers.

The essence of the process described in Claim I may be analyzed as follows:

Step 1: The recompressing of at least one standard bale.

Step 2: Into circular cross section.

Step 3: So as to place same in standard drum.

Step 4: And seal the same.

There is nothing in the file wrapper history which refutes the idea that the foregoing process was not the one allowed by the Examiner. (Ex. 14-A)

It is true as this Court stated in its previous decision that the material in the reissue application constitutes some evidence in connection with the resolution of the question whether or not the process utilized by the respondent constitutes infringement of the appellant's patent. But this does no mean that the Trial Court should make the decision as to the extent of the claims entirely upon the file wrapper history, as he apparently has done here; thus indirectly applying the doctrine of file wrapper estoppel.

In *Schnitzer vs. California Corrugated Co.*, 140 Fed. 2d 275 (9th Cir. 1944) this Court stated as follows with respect to an issue of infringement p. 276:

"While it is the rule in this Circuit that admissions made by the applicant to the Examiner are not to be used to narrow the scope of his claim unless he has made changes in his application pursuant to the Examiner's suggestions, the proceedings may be used to *aid* in construing the claim." (citing authority)". Again in *Moon v. Cabot Shop Inc.*, 270 Fed. 2d, 539 (9th Cir. 1959) this court again stated at p. 543:

"Claims of a patent must be construed not only in the light of specifications and drawings but also with reference to the file wrapper history * * * a claim must be read and interpreted with claims that have been rejected."

No relevant claim was rejected here by the Examiner (Ex. 14-A).

Of course here as we have pointed out several times, Claim I was allowed by the Examiner in its original form without any modification and upon an explanation that the claim contemplated the compressing of at least one bale of hops into a cross section form so that it could be inserted into any conventional drum and thereby eliminate the necessity of preparing an expensive lead lined box and sealing of same by solder. (Ex. 14-A, p. 17, 18).

It is thus seen that the patent Claim I (Ex. I) when carefully scrutinized in the light of the specifications, in the light of the file wrapper history and in the light of the effect given to file wrapper history by this Court, sets forth a process that is more general than the double drum process illustrated in the specifications.

It is clear from the foregoing that the patented process called for at least one bale which necessarily implied the use of one or more drums. That this was the scope of the claim as contended for by the applicant during the proceedings before the Examiner is apparent from the phrase following the quotation of the court on page 6 of the findings:

“* * * the diameter of which is always uniform so it can readily be used with *any* of the standard drums in the open market.

“Hence, the patent has disclosed a way for the elimination of the known custom built lead lined goods for shipping hops * * *.”

But even if the Examiner felt that the claim was allowable only on the double drum theory (*which he nowhere states in the file wrapper*) the court should be extremely reluctant to base a limitation of the claim upon such a thought or statement of the Examiner. It is only the Examiner's final ruling that can be appealed. Since the original claim was never withdrawn, never modified but allowed in its original terms, there of course could be no appeal. So far as we are aware, there is no appeal from any comment of an Examiner as to the scope of the claim if the claim is allowed in its original terms. To base, at this time, a limitation on the claim upon some comment on the Examiner from which there can be no appeal does not seem to be a sound proposition of law. It is for this reason undoubtedly that this court in *Schnitzer* indicated that admissions made by the applicant to the Examiner are not to be used to narrow the scope of its claim unless he makes a change in his application pursuant to Examiner's suggestion.

Thus, it becomes evident that the scope of Claim I of the patent (Ex. 1), covers and includes the respondent's process; and therefore, there is infringement.

II.

Prior Art

The prior art cited in the file wrapper history, Passarelli U.S. Patent No. 754, 340 (Ex. 60); Schoonmaker U.S. Patent No. 75,203 (Ex. 57); Schoonmaker U.S. Patent No. 77,768 (Ex. 56); and the patents cited

by the respondent here during the trial; Munford Patent No. 672,282 (Ex. 59); Howcott Patent No. 1,418,441 (Ex. 73), and the two texts, Hind, 1948 (Ex. 40) and Gross 1900 (Ex. 41) all teach as pointed out by the Examiner that there is nothing new in compressing rectangular materials into circular forms and there is nothing new in putting materials into tin cans; but that of course does not come to grips with the problem here. It is, we think, extremely significant that not one of these citations discloses and not one of these cited patents solve the problem nor indeed were they intended to solve the problem solved by the Meisler patent.

It will be remembered from the first hearing that the export phase of the hop industry was extremely limited due to the fact that it was necessary to build rectangular boxes, line them with lead or copper, insert the bale and seal it by hand soldering, obviously a very expensive process. As pointed out in the trial court's findings, hops are a very sensitive product (R. 70).

After they are exposed to air they lose their value to brewers (R. 70).

Furthermore, when they are shipped overseas in the original baled form wrapped in burlap as they come from the farm they pick up deleterious odors rendering them unfit for the brewery operation. Mr. George Gannon, a banker and successful hop grower in the Yakima Valley stated very clearly that there was no doubt about the fact that the Meisler invention was successful and opened up foreign markets and that many efforts had

been made to accomplish the results achieved by the Meisler invention; and that not only lead and copper boxes, but plastic and paper bags, were tried *without success* (R. 158, et seq., prior case). At the time of the trial substantial quantities of bales shipped abroad, which now amounts to a substantial percentage of the entire market, utilized the Meisler process; namely, taking “*at least one bale,*” *recompressing* said at least one bale into circular cross section (step 2) so as to place same into “any” standard drum (step 3) and sealing the same (step 4). How can it be said that unsuccessful methods and devices leave a narrow “crevasse” into which plaintiff’s patent fits? The trial court said:

the plaintiff argues for a liberal condition of the patent but * * * the * * * crevasse into which plaintiff’s patent fits is quite narrow indeed. The exact scope calls for a narrow rather than a broad view.”
(R. 72)

This is hardly a sound statement owing to the fact that the inventional ancestors failed to solve the problem with which the hop industry was faced.

The patents cited (Exs. 56-62 & 73) are in non-analogous art and, therefore, cannot be said to be inventional ancestors, since it was not obvious to one skilled in the art of packaging hops to know the manner or the method in packaging cigars or false teeth. Otherwise, why was the industry over 40 years in coming upon this simple solution to its problems?

Judge Learned Hand clearly analyzed this phase of the problem here in two cases written by him for the

2nd Circuit, *Rover v. I. Leon Co.*, 285 Fed. 2d, 501 (1960) and *Norman v. Lawrence*, 285 Fed. 2d 505 (1960). In the former case he stated at p. 503:

"It is idle to say that combinations of old elements cannot be inventions; substantially every invention is for such a 'combination': that is to say, it consists of former elements in a new assemblage. All the constituents may be old, if their new course would not 'have been obvious at the time the invention was made to a person having ordinary skill in the art'" (§ 103, Title 35). That has been the statutory definition since January 1, 1953. We discussed the question at length in *Lyon v. Bausch & Lomb Optical Co.*, 2 Cir., 224 F. 2d 530, and have little to add to what we then said. * * *

The test laid down is indeed misty enough. It directs us to surmise what was the range of ingenuity of a person 'having ordinary skill' in an 'art' with which we are totally unfamiliar; and we do not see how such a standard can be applied at all except by recourse to the earlier work in the art, and to the general history of the means available at the time. To judge on our own that this or that new assemblage of old factors was, or was not, 'obvious' is to substantiate our ignorance for the acquaintance with the subject of those who were familiar with it. There are indeed some sign posts: e.g. how long did the need exist; how many tried to find the way; how long did the surrounding and accessory arts disclose the means; how immediately was the invention recognized as an answer by those who used the new variant? In the case at bar the answers to these questions all favor the conclusion that it demanded more intuition than was possessed by the 'ordinary' workers in the field. The needs were known, but the purpose to fulfill them with that minimum of material and labor disclosed in the patent had not appeared * * *"

which is the situation here in the case at bar.

Again Judge Learned Hand in *Norman v. Laurence*, 285 Fed. 2d p. 506 stated:

“The invention therefore consisted of combining a kind of “pocket” that could be easily slipped on and off the clamp, with the old pad into a single member that would hold the earring in place upon the lobe of the wearer’s ear.

In spite of the fact that this combination was of the simplest sort, made of two elements that had for many years been used in the industry, no one had thought of combining them. Hence it is argued, as it always is when an invention consists of a combination of old elements, there there can be no “invention” in mere “aggregation.” In the case at bar the judge had found that “the commercial success was phenomenal, and again there is no reason to hold that this finding was “clearly” erroneous. * * * We can only reply that, while the standard remains what it is, we can see no escape from measuring invention in cases where all the elements of the new combination had been long available, (1) by whether the need had long existed and been desired, and (2) whether, when it was eventually contrived, it was widely exploited as a substitute for what had gone before.”

Here the need has existed for over 40 years—hence all other efforts to meet the need or solve the problem, met with failure and were entirely unsuccessful until the Meisler invention. (R. 158 et seq., prior case) Indeed, even the respondent did not use this process until respondent learned from one of appellant’s licensees how the process operated. (R. 174, prior case) All in the industry are utilizing the appellant’s process. Some are paying royalties, but respondent is not. None used the process until patented by Meisler. If the test laid down by Justice Learned Hand is sound, clearly that

test has been met here. Thus the patent of the plaintiff, contrary to the Trial Court's statement, is not narrow. A broader construction is desirable in view of the patent's lack of inventional ancestors successful in this field.

At this point it is in order to point out that the questions here involved are not questions of fact but of law. It is a well-established principle that the construction of a claim in a patent is a matter of law for the court to determine. In a recent case in this circuit (*Del Francia v. Stanthony Corporation*, 278 F. 2d 745) this court stated:

"The general rules of patent claims construction are well settled. A patent is to be construed as a contract, with the intent of the parties uppermost so as to give effect to their legitimate expectations. Further, since letters patent are contracts, questions of construction are questions of law for the court."

The Eighth Circuit has also adopted the same rule. In *Solomon v. Renstrom*, 150 F. 2d 805, the court stated:

"The interpretation of the claims of a patent is not to be determined by the opinion of experts, but is a question of law for the court. [Citing authority] The additional evidence was therefore simply advisory."

To the same effect see *Williams Mfg. Co. v. United Shoe Machinery Corporation*, 121 F. 2d 273, affirmed in 316 U. S. 364. See also *Singer Company v. Cramer*, 192 U. S. 265:

"* * * the question of infringement or no infringement is one of law and susceptible of determination on this writ of error."

Therefore, this Court should reverse and enter judgment of infringement and a decree calling for an accounting and assessment of damages.

III

Limitations Upon the Claim—Equivalency

It is evident from what has been said before that since the essential steps of the process claimed in Claim I of the Patent Exhibit I are included in the process utilized by the respondent, there is infringement.

That the specifications of the patent advert to two drums is not a limitation. In *re Vicher*, 141 Fed. 2d, 522, the Court of Customs and Patent Appeals in 1944 laid down this rule which has never been modified or reversed. The statute requires a patentee to explain the principle of his invention in "the best mode in which he has intended applying that principle." The fact that he illustrates one method does not limit the patent to that specific mode. The Court in that case stated on page 526:

"In construing that section, the Supreme Court of the United States in the case of *Continental Paper Bag Company v. Eastern Paper Bag Company*, 210 U.S. 405, 418, 28 S. Ct. 748, 751, 52 L. Ed. 1122, stated:

"An inventor must describe what he conceives to be the best mode, but he is not confined to that. *If this were not so most patents would be of little worth.* 'The principle of the invention is a unit, and invariable; the modes of its embodiment in a concrete invention may be numerous and in appearance very different from each other.' 2 Robinson, Patent, §485." (Italics not quoted.)

* * *

Obviously, the decision of the Board of Appeals,

as well as that of the Primary Examiner, is not in accordance with the rule as stated in the solicitor's brief, that is, "that ordinarily in a mechanical case broad claims may be supported by a disclosure of a single form of the apparatus disclosed in an application." Nor is the board's decision in conformity with the statement contained therein that "in a mechanical case an applicant may generally draw a broad claim on a single construction."

In mechanical cases, such as that here involved, broad claims may be supported by a single form of apparatus disclosed in an applicant's application. See *In re Kirschbraun*, *supra*, and cases therein cited; *Ex parte Kleinknecht*, 49 U.S.P.Q. 680; *Ex parte Vickers*, *supra*.

For the reasons stated, we are of opinion that the appealed claims were improperly rejected. Accordingly, the decision of the Board of Appeals is reversed."

So here the fact that two drums are mentioned obviously does not exclude a single drum application. As stated in the file wrapper, the Examiner's comment

"It is immaterial what shape the hops are pressed into and whether or not it is sealed *in the center or the end* * * *"

and in the patent attorney's remark:

"The Examiner is further requested to reconsider the statement that it is immaterial into what shape the hops are pressed into since an important part of applicant's invention is to be found in the fact that two ordinary rectangular bales of hops are pressed into a single bale, the diameter of which is always uniform so that it can be used with *any* of the steel drums found in the open market." (Ex. 14A, pp. 17, 18)

"Applicant has disclosed the need for the elimination of the known custom built metal lined boxes for shipping hops."

It is apparent that at the time of consideration of the allowance of Claim I, *the issue did not turn upon whether one or two drums were used*. The essence was to be found in the change in the shape, thereby permitting the use of *any* standard drum, and ease of sealing.

So far as the respondent's methods are concerned, the four essential steps of the Meisler Patent are utilized by the process and infringement does exist. The principle of taking the standard Western farm hop bale (already compressed at the farm) rectangular in shape and re-compress it into a circular form to fit into a standard drum and sealing is identical. This is the essential idea of applicant Meisler's patent. Indeed, at the close of the first trial after the court had gone to the warehouse of both parties and had demonstrated for him what was being done by Meisler and what was being done by respondent, the trial court stated:

"* * * Were we to interpret the original patent as issued without reference to the reissue application it might be permissible to construe Claim I as reading upon the accused packaging now used by defendant * * * by failing to appeal (rather than withdraw the reissue application) * * * plaintiff in my judgment may not now contend that the claims of the original applicant and patent are susceptible to an interpretation that they cover single drum containers as well as two drum containers. The doctrine of file wrapper estoppel seems applicable and controlling."

But, of course, the doctrine of file wrapper estoppel is no longer applicable in this case by reason of the prior decision of this court. It would seem that the first im-

pression of the trial court, after consideration of all the patents now cited and all of the history now cited (i.e. all of the prior art) and having freshly examined the operations of Meisler and respondent was a sounder opinion than the one expressed in the finding which, of course was the one proposed by the respondent.

In his interrogation of the witness George Gannon, the cross examiner obtained the following:

“Q. And in your view of it, all Mr. Meisler did then was to recompress the bale into circular shape to put it in a circular drum or container?

A. Yes.”

Likewise the court made the same point:

“THE COURT: So that the advantage of the packing is that it utilizes an available container, namely, the drum?

THE WITNESS: That is right.” (R. 163, prior case)

Furthermore, it is established law that where the invention, as in the case at bar, pertains to the process or method, here the process of recompressing bales of hops into a circular form and placing the same in “an available container namely the drum”—such patent is infringed even though the infringing method be carried out in a different number of steps and with different methods. As quoted above in *Vicker*, (141 F. 2d 522) broad claims may be supported by a single form disclosed in an applicant’s application. The landmark case of *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 339 U. S. 605, 85 USPQ, 328, is directly in point. There the court stated on page 331:

“But courts have also recognized that to permit imitation of a patented invention which does not copy every literal detail would be to convert the protection of the patent grant into a hollow and useless thing. Such a limitation would leave room for—indeed encourage—the unscrupulous copyist to make *unimportant and insubstantial changes and substitutions in the patent which, though adding nothing, would be enough to take the copied matter outside the claim, and hence outside the reach of law.* One who seeks to pirate an invention, like one who seeks to pirate a copyrighted book or play, may be expected to introduce minor variations to conceal and shelter the piracy. Outright and forthright duplication is a dull and very rare type of infringement. To prohibit no other would place the inventor at the mercy of verbalism and would be subordinating substance to form. It would deprive him of the benefit of his invention and would foster concealment rather than disclosure of inventions, which is one of the primary purposes of the patent system.”

It is clear from the foregoing that the use of a single drum is merely another illustration or equivalent of the use of two drums bearing in mind that the essential idea of the patent as established by opposing counsel as well as by the Trial Court on his examination of the witness is the simple four step idea as stated above:

Step 1: The recompressing of at least one standard bale.

Step 2: Into circular cross section.

Step 3: So as to place same in standard drum.

Step 4: And seal the same.

The two drum illustration or application of this idea was, therefore, merely illustrative and not limiting. It is of significance that it would be a virtual economic impossibility for the growers in Western states, which

produce substantially all hops produced in the United States, in the first instance to bale their hops in a circular form since all of the growers' equipment would have to be abandoned and new equipment installed (R. 62, 63, prior case). A particular process once adopted in an industry cannot be uprooted without great damage and loss. Therefore, the inventor's idea here is not narrow nor does it fit into a narrow crevice as it existed in the hop industry at the time of its conception and the time of the application for the patent Exhibit 1.

The thought underlying the Trial Court's final decision in this case appears to be that the respondent's process is materially different from the appellant's process because it is a net weight process. When the bale is cut in two, although there is substantial wastage, therefore making the respondent's operation inefficient as compared to appellant's method, the loose hops can be added or taken away and thereby a net weight obtained.

This, of course, can be done by appellant's method of selecting bales to give the required weight and, therefore, this added feature is not inventive but even if it be inventive, it does not defeat the charge that the invention caused the respondent to utilize the four essential steps of appellant's Claim I of appellant's patent stated above. For example, at one time the fountain pen was or could have been the subject of a patent (even though it was contained in a single or double base). Someone added a clip so that it could be inserted in a

shirt pocket. This addition of the clip may or may not have been inventive at the time. But the use of the pen would, of course, infringe the original patent with or without the added clip. Thus, the addition of an element which may or may not be inventive does not limit the claim or defeat the charge of infringement.

In other words, the charge of infringement is not voided by adding another step to the process, when the steps of the patent in question are utilized and the result obtained by such use. So here, the mere fact that the bale is cut in two and an added feature of the control of the net weight of the packaging does not alleviate the infringement. In this connection, of course, the doctrine of equivalency is important and it is our contention that the operation of the respondent and the process claimed in Claim I of appellant's Patent Exhibit 1 are equivalent within the meaning of the law.

In the early work, "The Law of Patents," Vol. 1 by William C. Robinson, it is stated, page 337:

"An equivalent is therefore any act or substance which is known in the arts as a proper substitute for some other act or substance employed already as an element in an invention, and whose substitution for that other act or substance does not in any manner vary the idea of means."

In that treatise the idea contended for here that a process performing an additional function is nevertheless an infringement of the original patented process is recognized. The author stated, p. 340 and 341:

"Again, equivalence is not affected by the fact that the new element performs in the invention

some function in addition to the old. While it is necessary that the entire service rendered by the act or substance, whose place another occupies, should be discouraged, it is not essential that the operation of the substitute should be confined within the same limits as the former. It is sufficient that it serves the same use; if it serves others also, or better serves the old, it is no less an equivalent than if the entire functions of each, as elements in the invention, were identical. One act or substance may thus be the equivalent of another, although the latter, if the former had been first employed, could not have been regarded by itself alone as its complete and perfect substitute in the invention. Yet as to the one use which both alike subserve, they stand on the same footing as if no other use were possible to either, and as to that are interchangeable equivalents."

To the same effect is *Highway Appliances Co. v. American Concrete Expansion Joint Co.*, 93 Fed 2, 113. There the 7th Circuit held as follows, page 118:

"Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape, *Union Paper Bag Machine Co. v. Murphy*, 97 U.S. 120, 125, 24 L. Ed. 935. And see *Elizabeth v. Pavement Co.*, 97 U.S. 126, 137, 24 L. Ed. 1000. That mere colorable departures from the patented device do not avoid infringement, see *McCormick v. Talbott*, 20 How. 402, 405, 15 L. E. 930. A close copy which seeks to use the substance of the invention, and, although showing some change in form and position, uses substantially the same devices, performing precisely the same offices with no change in principle, constitutes an infringement.

"* * * The improvements, however, in each instance, were merely the result of applying such

knowledge and training, as might be expected of those familiar with such problems, to the structure described and claimed in the Older patent. In *Farrington v. Haywood* (C.C.A.) 35 F. 2d 628, on page 631, it is said: 'Doubtless the defendant's stirrer has some functions not possessed by the plaintiff's, and it may be under some conditions an improvement thereon, but this fact also does not avoid infringement. *Gordon Form Lathe Co. v. Walcott Machine Co.* (C.C.A.) 32 F. 2d 55'."

See also, *Waterproof Insulation Corp. v. Insulating Con. Corp.*, 153 Fed. Supp. 626, where the court said, page 631:

"Wicor is the equivalent of the Goff system. Plaintiff urges that as rubber was not, at the time the Goff patent issued, known as an interchangeable ingredient, it cannot be held to be an equivalent. Again, this ignores the fact that the Goff patent, as distinguished from the Bell patent, is for a system, not a "construction material." Moreover, infringement is not avoided by the fact that a patented combination has been improved by the substitution of a new element which in itself may be the basis for a patent. *Frick v. Lindsay*, 4 Cir., 1928, 27 F. 2d 59, 63; *Wine Ry Appliance Co. v. Baltimore & Ohio R. Co.*, 4 Cir., 1935, 78 F. 2d 312, 316; *Ackermans v. General Motors Corporation*, 4 Cir., 1953, 202 F. 2d 642, 646, certiorari denied 345 U. S. 996; 73 S. Ct. 1139, 97 L. Ed. 1403, rehearing denied 348 U.S. 842, 74 S. Ct. 16, 98 L. Ed. 362; *Temco Electric Motor Company v. Apco Manufacturing Co.*, 1927, 275 U.S. 319, 328, 48 S. Ct. 170, 72 L. Ed. 298; *Finkelstein v. S. H. Kress & Co.*, 2 Cir., 1940, 113 F. 2d 431, 422."

In a recent case decided by this court, Justice Jertberg in writing the opinion in *Hansen v. Colliver*, 282 Fed. 2d. 56, was confronted with the use of the word "guide" in the claim. The defendant seeking to escape

a charge of infringement had used a "table top" in lieu of a "guide" in connection with the means of interchanging cores in wire rope. Justice Jertberg stated as follows, page 69:

"In our view the proper construction of claim 1 requires a "guide" but does not require a guide of any specified shape or form or that the rope shall be guided by any particular means. While we are inclined to disagree with the view of the district court that the table top of the appellees' device is not a guide and therefore does not literally infringe appellant's patent, we are wholly satisfied that the undisputed facts compel the application to this case of the doctrine of equivalents. The doctrine is applicable if the accused device performs substantially the same function in substantially the same way to obtain the same result as that claimed for the patented device. *Sanitary Refrigerator Co. v. Winters*, 1929, 280 U.S. 30, 42, 50 S. Ct. 9, 74 L. Ed. 147; *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 1950, 339 U.S. 605, 70 S. Ct. 854, 94 L. Ed. 1097.

Normally, the question of infringement is one of fact. In this case, however, since the facts are not in dispute the question of infringement resolves itself into one of law, depending on a comparison between the patent claim in issue and the accused device, and the correct application thereto of the law of equivalency. *Kemart Corp. v. Printing Arts Research Laboratories*, 9 Cir., 1953, 201 F. 2d 624; *Del Francia v. Stanthony Corp.*, 9 Cir., 1960, 278 F. 2d 745. See also *United States v. Parke, Davis & Co.*, 1960, 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505.

* * *

In our view the accused device performs substantially the same function in substantially the same way and obtains the same results as are embraced in claim 1 of the patent. It may be, as indicated by the trial court, that appellees' device is superior in its simplicity in the use of a table top instead of a guide. If the table top is an improvement it is never-

less the equivalent of the guide and is merely a change in form. As stated by the district court in its memorandum opinion:

“A claim, however, does not limit the patentee to the exact mechanism described, leaving the public at liberty to construct substantially identical copies of the patented machine by varying its form or proportions (*White v. Dunbar*, 119 U.S. 47, 7 S. Ct. 72, 30 L. Ed. 303), or to adopt mechanical equivalents for the machine or portions thereof (*Hobbs v. Beach*, 180 U. S. 383, 21 S. Ct. 409, 45 L. Ed. 586).”

Under the facts of this case and the law applicable thereto, the appellant is entitled to a decree that the appellees' device infringes his patent, and to the injunctive relief sought. The portion of the judgment appealed from is reversed.”

As stated in the *Graver* case above cited, a patent becomes a completely useless and void thing and the purpose of the constitutional provision upon which the validity of a patent depends is thwarted if an equivalent such as respondent's process is held not to be an infringement. The claim is thus not limited to the double drum application.

IV

Non-Analogous Art

We wish here to emphasize again that the prior art existing at the time the Meisler application was filed *did not solve*—indeed *did not attempt to solve* the problem the hop industry had, namely, safe and economical means of shipping abroad. As was stated in the specifications of the patent (Ex. 1):

“It is an object of the instant invention to provide better packing which will be impervious to

weather, negligent handling, and poor storing in the holds of ships where other cargoes may contaminate the hops with odors, moisture, acids, etc., the hops being easily damaged.”

Nothing had accomplished the foregoing objective except as stated by Mr. George Gannon lead lined and copper boxes; plastic and paper bags were introduced with no success (R. 158 et seq., prior case). After the Meisler invention came into use, the process was utilized throughout the industry and resulted in the development of a foreign trade which absorbs a substantial percentage of the annual crop, not only making the hop industry as a whole more profitable but adding additional acres of land to hop production, each a worthwhile economic objective. The test laid down by Judge Hand in the cases cited above clearly indicates that the test of non-obviousness has been met.

Against this undoubtedly sound conclusion respondents have heretofore cited several additional patents, some of which were cited by the Examiner and some of which were supplied during the progress of the trial. As was pointed out by the Examiner there is nothing new in taking material and changing its shape from rectangular to circular nor is there anything new in recompressing hops but none of this solved the problem that the hop industry was confronted with as stated above. Specifically, the method disclosed in the Passarelli patent No. 750,350 showed the compression of a rectangular bale of cotton into a circular bale of cotton aiding the hop industry. Likewise the use of a circular

can in which to carry a set of false teeth did not solve the problem. Furthermore, it is a simple device to press finished cigars into a can. The invention required for solution of the problem was not contained in any of the patents cited. They did not purport to solve the shipping problem in the hop industry and further, *they did not do so*. As anticipatory, each of these patents was in a non-analogous field and, therefore, are not pertinent and cannot be used to defeat the claim contended for here.

For example, in the case of *Elrick Rim Company v. Reading Tire Machinery Co.*, 264, Fed. 2d 481 (9th Cir. 1959), this court indicated that development or patent in non-analogous art is not relevant to refute a charge of infringement. In that case the method of spraying liquid rubber cement on tires was not defeated nor was its scope limited by the fact that a similar spray device or method was utilized in the paint industry. In seeking to have the claim limited and declared invalid, the defendant argued that as compared to the prior paint spray art taught by the Shelburne patent Reading cannot be regarded as the invention or discovery of a new and useful process. The same comparison is drawn and assertions made concerning the prior liquid cement art practices by Cahill and Hartman. Justice Hamley stated as follows on p. 486:

“It has already been noted that the Reading process can be utilized by means of the Shelburne, Graddolph, or McLean device, providing certain adjustments or changes are made. This fact alone, how-

ever, is not sufficient to rule out patentability. The term "process" is defined in the patent law as including "a new use of a known process, machine, manufacture, composition of matter, or material." 35 USCA §100(b). * * *

In our view these two variances are sufficient to warrant the conclusion that Reading teaches a nonanalogous art and is therefore a "new" use of a known machine within the meaning of §100(b).

It is true, as appellant argues, that in numerous decisions the rule has been announced that the mere function of a machine is not patentable. But this rule does not apply in the case of a process patent involving the use of a known machine where such use is found to be "new" within the meaning of §100(b), provided the other conditions of patentability are satisfied."

Again, in the case of *King v. Anthony Pools, Inc.*, 202 Fed. Supp. 426, Judge Yankwich was faced with the contention that developments in connection with irrigation practices pertaining to streams and lakes were relevant to a method or device for the handling of water in swimming pools. He stated as follows in finding against the defense, p. 429:

"The defense of anticipation by prior patents is based chiefly on three patents relating to dams and weirs for streams: * * * To apply these patents relating to *streams and lakes* to the small compass of a swimming pool would call for a change in environment and a change in structure, as the defendants' expert, Robert H. Daugherty, readily admitted."

So here development in the field of cigars or cotton could hardly be relevant to patents pertaining to development in the Western hop industry with its special unique problems. Thus the patents and texts cited by

appellant have no relevancy here in narrowing the scope of the claim or defeating the claim of infringement.

V.

Findings of the Trial Court

The findings of the Trial Court in general were drafted by counsel for respondent (both parties submitted findings) and were adopted by the Trial Court. In the findings of fact Nos. referred to above the Trial Court finds that the process set forth in Claim I of Exhibit 1 is related to the use of two drums and the use of two drums is a necessary phase of the appellant's process set forth in Claim I (R. 68).

In the first place it is appellant's contention that these findings in so holding (6-22) are incorrect. As to whether or not the file wrapper of the Patent and its application disclosed the use of one or indeed more than two drums, we call your honor's attention to the fact that the last paragraph of the specifications clearly indicates that there are other methods and means. We repeat that quotation at this point, "it is obvious that the methods illustrated and devices herein are subject to many variations within the scope of the claims. Further, the claim itself, Claim I, refers to the compressing of

"* * * at least *one bale* of hops of rectangular cross section into a *bale* of circular cross section, fastening the bale of circular cross section with spaced flexible members disposed transversely therearound, placing the bale of circular cross section

into two steel drums with the flanges around the open ends thereof superposed, and sealing the superposed flanges on *the drum*."

It would be obvious, we think, to anyone examining Meisler's operation to see that a single drum would be the equivalent and just as easily used as a multiple drum. The language of the claim itself would indicate that a single drum application was contemplated. The reduction in volume described in the specifications of a bale of hops indicates in the event one bale was used, a single drum would be the only proper receptacle. In these findings the court also indicated that there is nothing in the file wrapper history to indicate anything except the use of two drums essential to the process. Such is not the case. The patent attorney in reply to the Examiner indicated that the object was to conform the bale of hops "at least one bale" into a form to fit "*any* of the steel drums found in the open market"—again contemplating a single drum. With respect to the matter of file wrapper as to the reissue application, the Trial Court in its findings adopts as an aid in construing Claim I the language contained in the oath, power of attorney and petition for the reissue, the broad conclusion,

"I claim that my said letters patent is * * * invalid * * * in that the specifications and the short description of the invention does not indicate that the sealing of the bale into two steel drums is an optional procedure." (Ex. 14)

This, of course, is a broad general conclusion based upon the advice of the attorney that the letters patent

were invalid—an ultimate conclusion of law. It would seem that the only material in the oath to aid the construction of the claim would be more specific statements such as the following as to which Mr. Meisler in the oath and petition also swore to:

“* * * the original patent describes my invention as a combination of a method of compressing hops with the step of placing a bale into two steel drums, while actually one steel drum can be used in place of two steel drums *without affecting the scope of my invention.*” (Ex. 14)

It thus appears that the material factual statements in the application for reissue—not the broad conclusions of law—support the contention that the original claim does cover the use of a single drum and that the use of two drums is not an essential element of the process of Claim I of the patent and at the very least is an equivalent. The position of the applicant has been at all times consistent notwithstanding that the Trial Court felt that there was an inconsistency and that it defeated this action for infringement. It was not at all inconsistent to apply for a reissue for had the reissue been granted it would not have meant the original claim did not cover the single drum application but it would have had the advantage to the claimant that he would not have to depend on the doctrine of equivalency in seeking to enforce his patent and protect his invention.

This court should hold that the doctrine of equivalency does apply and that the patent is infringed be-

cause it seems perfectly clear from the foregoing analysis that the defendant's operation does so infringe.

CONCLUSION

In the two recent Supreme Court cases, *Graham v. John Deere Co.* and *U. S. v. Adams*, 383 U. S. 1, the effect of the 1952 act was analyzed and the comment in *Cune v. Automatic Devices Corp.*, 314 U.S. 84, that a patent required a "flash of genius" was relegated to a matter of rhetoric rather than an exact standard of inventiveness. Justice Clark indicated the 1952 statute merely restated and confirmed existing court made law, that in addition to novelty and utilization the invention must be of a nonobvious nature to a person having ordinary skill in the pertinent art. If as true in the case at bar, it takes the industry 40 or 50 years to solve a problem, the solution, no matter how simple in retrospect, was not in fact so obvious to a person having ordinary skill in the pertinent art. As Justice Learned Hand indicated, when there is a long felt need and the invention in question answers the problems successfully and is accepted and utilized by the industry, it cannot be said that the invention is obvious. This is the gist of the holding in the case of *U. S. v. Adams*, 383 U.S. 39. The invention in *Adams* related to a water-activated battery operated with cuprous chloride and magnesium. In that case Justice Clark said,

"* * * it is fundamental that claims are to be construed in the light of the specifications and that they are to be read *with a view to ascertaining the invention.*"

In neither the specifications nor claims was there any reference to any electrolyte. Justice Clark in affirming said:

“The obvious implication from the absence of any mention of electrolytes—a new element in any battery—in the other 8 claims reinforces this conclusion (that water alone can be used).”

The court below held that the Government's battery had been the equivalent. The Supreme Court of the United States thus holds that the doctrine of equivalency still applies and protects the inventor so he and others will be induced to exercise their ingenuity to the advantage of mankind. The court further said,

“* * * We do say, however, that known disadvantages in old devices which would naturally discourage the search for new inventions may be taken into account in determining obviousness. Nor are these the only factors bearing on the question of obviousness. We have seen that at the time Adams perfected his invention noted experts expressed disbelief in it. Several of the same experts subsequently recognized the significance of the Adams invention, *some even patenting improvements on the same system.*”

If the purpose of the constitutional provisions establishing the right of Congress to provide for patents and if inventor is to be rewarded by giving to him part, at least, of the profits from the use of his invention and if, as the Constitution indicates, it is a worthwhile objective of our Government to grant patents so as to “serve to incite ingenuity,” then it would appear that infringement should be found here.

The history of the industry, the history of this pat-

ent, the history of the operation of respondent clearly indicate that to hold otherwise is to destroy rather than to enhance the invitation to ingenuity called for by the Constitution.

It is respectfully submitted that the Trial Court should be reversed and the respondent should be ordered to account for his profits and other damages prayed for in appellant's complaint.

Respectfully submitted,

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CERTIFICATE

I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 20750

M. O. S. CORPORATION, *Plaintiff-Appellant*,

v.

JOHN I. HAAS, INC., *Defendant-Appellee*.

On Appeal from the United States District Court for the
Eastern District of Washington, Southern Division

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The statement of the case appearing in appellant's brief is controverted by defendant-appellee. Accordingly, the following statement is provided, in accordance with Rule 18.3 of this Court.

This Court, by its decision of May 28, 1964 in Appeal No. 18953 (332 F.2d 910), decided only that the facts established on the original trial pertaining to plaintiff's appli-

cation for reissue, its rejection, and the abandonment of the application, did not preclude plaintiff from *asserting* that, by the application of the doctrine of equivalents, the claims of the patent cover the method of compressing and packing hops in single standard drums.

The cause was remanded to the district court for further proceedings. Pursuant to the remand, expert testimony in affidavit form was filed by both parties. The expert witnesses appeared before the trial court for cross-examination and for interrogation by the court on June 2, 1965. At this time, both parties filed briefs and proposed findings of fact and conclusions of law. The proceedings are reported in Volume V of the record on appeal.*

The trial judge filed his Memorandum Decision, Findings of Fact, Conclusions of Law and Judgment on August 11, 1965 (R. Vol. I, 68-85).

The trial court concluded that claim 1 of the patent in suit had not been literally infringed and that it could not be construed to cover, as an equivalent, the accused single drum net weight packaging procedure used by defendant. All of the claims in suit were held not infringed and the action was dismissed on this ground.

The issue of validity was not determined by the court, as a decision on the question of infringement under the doctrine of equivalents of claim 1 would be decisive of the plaintiff's claim.

Appellant's brief before this Court largely ignores the disclosure of the specification and drawings of the patent in suit and makes scant reference to the specific limitations of claim 1, the only claim in issue. Instead, it deals with the alleged commercial impact of the "Meisler invention" on the hop growing, packing and shipping industry in the Western States.

* The record on appeal consisting of five volumes will be referred to by volume and page number, as presently paginated.

There Is No Evidence To Support the Alleged Commercial Impact of the Patented Process

Appellant, in utter disregard of the record herein, improperly seeks to impress this Court by repeated allegations as to the economic or commercial success of the patented process and its impact on the hop industry. Thus, in its brief plaintiff states at page 5:

“Efforts were made to use paper bags and plastic bags without practical success, so that at the time of the Meisler invention there was very little trade abroad. With the advent of the Meisler invention, however, trade abroad has significantly increased and a substantial part of the production of hops is shipped abroad to South America, to the Orient and to Europe, utilizing the Meisler invention. (R. 150 et seq., prior case)”

“The Meisler invention, which has changed the economy of the hop industry, permitting the raising of substantially more hops in the Western States than had ever been raised before, . . . (R. 63 et seq., 115 et seq., prior case)”

And at pages 24-25 plaintiff states:

“Mr. George Gannon, a banker and successful hop grower in the Yakima Valley stated very clearly that there was no doubt about the fact that the Meisler invention was successful and opened up foreign markets and that many efforts had been made to accomplish the results achieved by the Meisler invention; and that not only lead and copper boxes, but plastic and paper bags, were tried *without success*. (R. 158, et seq., prior case)” (Italics, appellant’s)

Similarly at page 27 plaintiff states:

“All in the industry are using appellant’s process”.

And again at page 40 of its brief plaintiff states:

“After the Meisler invention came into use, the process was utilized throughout the industry and resulted in the development of a foreign trade which absorbs a

substantial percentage of the annual crop, not only making the hop industry as a whole more profitable but adding additional acres of land to hop production, each a worthwhile economic objective."

A review of both the rather infrequent references by appellant to the record, as well as the record as a whole, utterly fail to disclose any evidence which supports such allegations. Indeed, the testimony of appellant's own witnesses at the trial negatives such allegations of commercial impact.

Thus, the most careful scrutiny of the testimony of appellant's witness Gannon, which spans only 7 pages of the record (R. Vol. II, 158-164) clearly shows no suggestion whatever that he had any knowledge of the patented process or that the Meisler patent had developed extensive overseas sales of hops which did not exist before. On the contrary, it appears that had Gannon been asked to testify as to the commercial success of the patented method he would have been unable to do so since his Yakima Sheep Ranch, Inc. which grew, baled and recompressed hops for export, packed only rectangular bales. Thus, on direct examination Gannon testified as follows : (R. Vol. II, 161)

Q. Now, the bale that you recompress is a round one?

A. No, it is a rectangular one.

Q. It is a rectangular one?

A. We don't do any round work.

Of course his testimony also clearly gives the lie to appellant's unsupported allegation, quoted above, that "all in the industry are utilizing the appellant's process."

Similarly at the trial another of appellant's witnesses, Chris Eismann, an employee of the firm of S. S. Steiner, a licensee under the Meisler patent, was rather hard-pressed when, on direct examination by appellant's counsel, he was asked about the economic advantages of the patented method.

Thus, at R. Vol. II, 168, Mr. Eismann testified with regard to Meisler's patented method as follows:

Q. And is his development economically successful? Does it have any economic advantages, in your opinion?

A. I am sure it must have. For one thing I believe it is a little cheaper than some other packages and the fact that some people desire that method of packing illustrates that it must have some advantages.

And on cross-examination Eismann testified:

Q. Yes. You said that the economic advantage of the Meisler method was largely because of the packages—that is, the drums were cheaper than other packages; do you think that is the principle advantage?

A. That is one advantage, and as I mentioned some people have a preference for that type of package. Just why, I don't know. (R. Vol. II, 170, prior case)

It is also apparent from Eismann's testimony that appellant's allegations as to the revolutionary effect of the Meisler method on the hop industry and its rendering of prior art hop packaging techniques obsolete is completely unfounded.

Thus, on direct examination Eismann testified (R. Vol. II, 168):

Q. Do you do any other type of packaging other than the Meisler method?

A. Yes, we pack in singles and doubles without extra wrapping, and singles and doubles with extra wrapping, and singles and doubles in cases and drums.

Appellant's witness, James Byers, who had been in the hop brokerage business since 1925, reflected a similar lack of commercial enthusiasm for the Meisler method when he testified that only rectangular recompression had been done in Oregon and acknowledged that "there is very little or no recompressing going on in Oregon at the present time". (R. Vol. II, 179, 181, 182)

The above quoted assertion by appellant that the patented Meisler method has significantly increased trade abroad is clearly an obvious and blatant misrepresentation of the record. The record simply does not support such a claim. Similarly, appellant's contention that the Meisler invention has "changed the economy of the hop industry" and permitted "the raising of substantially more hops in the Western States than had ever been raised before" is not only utterly unsupported by the record, but is also contrary to fact. Appellant did not produce even an iota of evidence to substantiate these exaggerated claims, in spite of the fact that such evidence would have been available if the facts were actually as claimed. This court may well take judicial notice of the fact, of which appellant is undoubtedly aware, that the United States Department of Agriculture periodically publishes agricultural production statistics, including the total annual hop production of the Western hop growing states. Appellant never sought to introduce such publicly available reports for the years before and after the commercial introduction of the Meisler method in support of the claim economic or commercial impact of the invention on the industry. This is understandable since even a cursory reference to such reports reveals that the total hop production of the Western States, namely, Idaho, Washington, Oregon, and California for the crop year 1945 (some six years prior to Meisler's filing of his application for patent) was actually several million pounds *greater* than for 1964, over ten years after the commercial introduction of the Meisler method.*

From the foregoing it is clear that plaintiff's allegations as to the revolutionary character of the Meisler method and its impact upon the hop industry is not only totally unsupported by the evidence in the record but contrary thereto. Indeed, it appears that appellant in its brief is seeking to

* Documented, in the United States Department of Agriculture report entitled, "Selected Hop Statistics", prepared by Fruit & Vegetable Division, Consumer Marketing Services, Department of Agriculture, Washington, D. C., March 1965.

foist upon this Court the legally and factually unsupported, and appellee adds unsupportable, proposition that economic success itself entitles Meisler's limited patent monopoly to be broadly construed. Not only does no such legal proposition exist in the patent law, but even plaintiff's allegations of economic success do not find the support which plaintiff attributes to the record.

The Process Shown, Described and Claimed in the Patent in Suit

Instead of discussing the "invention" involved in this litigation by reference to the disclosure of the specification and drawings of the patent and the specific terms of the claim, appellant relies upon the ingenious imagination of its expert witness, a practicing patent lawyer in Seattle, to describe a very different invention. His evaluation of the "invention" (Brief, pages 9-11, 20 and 21) is based upon hindsight and events which have transpired during the many years since the filing of the application for patent in July 1951.

In its statement of the case, appellant paraphrases the testimony of this patent-lawyer-expert in an effort to re-write the claim completely and to present to this Court as the "invention" covered by the patent, a method which the patentee never presented to the Patent Office, and one which was never considered by the Examiner.

Since, as pointed out below, a patent must be construed as a contract, it is important to determine factually, rather than by the theories of an expert, just what the inventor offered to the public (as represented by the Patent Office) in exchange for a 17-year monopoly, just what the public accepted, and what was intended to be, and was granted as a limited monopoly in exchange for, and in consideration of, the disclosure.

We will refer briefly to the specification and drawings of the patent in suit, which constituted the disclosure, and to

certain fact findings of the trial court to show just what Meisler had "invented" when he went to the Patent Office and asked for a patent. The opening portion (Ex. 1, col. 1, ls. 3-17) describes the standard prior practice of placing *two* elongated sacks or bales of hops, each weighing approximately 200 pounds, one upon the other, and inserting them into a press to reduce their combined height to one-half. The resulting two bales, bound together into a single, elongated rectangular bale, were placed in a metal lined case for shipment. The patent explains that to attain the object of the invention, the two standard bales of hops "are inserted in a press which reduces the two rectangular bales to one of *circular cross section*".* The specification then describes (col. 1, ls. 42-44) what is emphasized throughout the specification and claims as the essential step of the invention, constituting the exact point of novelty,

" * * * The compressed bale of circular cross section is then fastened with wire and hermetically sealed in *two* standard steel drums."

The "two standard steel drums" are shown in Figure 5 of the patent, which is described, col. 2, ls. 13-15,

"Figure 5 is an elevational view in part section of the bales shown in Figure 4 packed in standard steel drums for shipment."

It should be noted that the two standard steel drums are arranged end to end, forming a container of double length, to receive the elongated cylindrical bale of Figure 4, made in the elongated press of Figure 1.

The specification continues, col. 2, ls. 30-36:

" * * * 12 indicates the two steel drums in which the resultant bale of circular cross section is inserted for shipment; 13 indicates one form of seal for the drums; 14 indicates a second form of seal for the drums; and 15 indicates the tool for securing either seal around the flanges of the drums."

* Emphasis in quoted matter, added throughout.

Again, at col. 3, ls. 9-13, the specification states:

“The resultant bale of circular cross section is then inserted in two standard 55 gallon steel drums 12 with the outwardly and downwardly directed flanges 21 circumferentially formed around each open top superposed.”

The operation, after the formation of the cylindrical bale shown in Figure 4 has been completed, is described at col. 3, ls. 45-59:

“ * * * The resultant bale is then removed from the press and placed into one of the two steel drums 12. Of course, one end of the bale will protrude beyond the drum and over the protruding end the second steel drum is placed so that when the bale is completely enclosed, the flanges around the open top of each drum are superposed. The rubber tube 22 is then inserted in the outer recess formed by the flanges. Next, the adhesive strip 23 is put on over the rubber tube and the contiguous surface portions of the flanges and over the adhesive strip the steel band 24. The various elements of the seal are held in place by the spaced clips 25 attached by the tool 15. * * * .”

As admitted by plaintiff's expert on cross-examination (R. Vol. III, 410, 418), nowhere in the specification is there the slightest suggestion that less than *two* steel drums may be used in accordance with the invention. In the general description of the invention, in the drawings and in the particular description, “two standard steel drums” and “two steel drums” are always referred to.

That all of the claims of the patent are equally explicit in specifically requiring the use of *two* steel drums was noted by this Court in its earlier decision at 332 F.2d 910, 911:

“The *claims and specifications* of the patent describe a process and method of pressing *two standard bales* of hops into one circular cross section bale, which is then placed into *two standard steel drums* for shipping.”

Moreover, although Meisler appeared as a witness at the trial, he made no contention that, prior to the filing of his application for patent, he had ever packed any form of recompressed bales of hops in *single* drums. There was extensive testimony indicating that this idea evolved at a much later date. As a result of a review of all of the evidence on this point, the court found (R. Vol. I, 78):

“XV. There is no evidence that at the time application for patent was filed [July 13, 1951], or even as late as August 3, 1953, when the applicant added by amendment two claims directed specifically to the two-drum container, which appear as patent claims 6 and 7, that the patentee, Meisler, contemplated anything other than the recompressing of intact rectangular farm bales into an elongated cylindrical bale and the packaging of the cylindrical bale in two steel drums secured end to end with their flanges superposed and sealed.

“XVI. All of the method and container claims presented to the Patent Office in the entire history of the Meisler application were limited to the use of two drums and no claim was ever asserted to a method or container involving only one drum.”

Meisler's testimony at the trial indicates that packaging of recompressed bales of hops in single drums, which necessarily involves cutting the bales in half, would inevitably result in a violation of the integrity of the original ranch bales and would be the antithesis of his invention, which required *maintaining intact* the original ranch bales.

On direct examination, Meisler testified (R. Vol. II, 68-69):

“ * * * I finally found a method whereby we could take our rectangular bales without—remember that I did not own these hops. I could not do anything to a bale of hops but maintain it in its original form because the exposure of a commercial process to damage hops would just ruin me. * * * I had to develop a method which would not injure the hop or disrupt this density * * * .

"I had to take these domestic bales and maintain that 400-pound competitive product and not change the state of the hop itself."

and at page 70,

" * * * I could not touch this hop. They were not mine to touch."

On cross-examination (R. Vol. II, 103, 104) the following testimony appears:

"Q. And then you always also have two layers of burlap extending through the double bale which were part of the original ranch bale which you combined in your press?

A. We do that sir, yes. We don't own the product. Therefore, we cannot mutilate or damage or expose ourselves to any damage to the product or contamination.

Q. That is

A. (Interposing) That is a precaution we have to take because of the industry.

Q. And that really is an essential part of your process, the compressing of the two bales into one—

A. (Interposing) of circular cross-section."

Thus, one of the advantages, in fact an essential feature, of Meisler's method was that two farm bales in their original burlap wrappings could be compressed and packaged in two standard steel drums arranged end to end with their flanges juxtaposed and sealed, without touching the contents of the bales.

From the foregoing it is apparent that what the patentee offered to the public (as represented by the Patent Office) was only the disclosure of compressing two intact standard bales of hops into a circular cross section and packaging the resultant elongated circular bale in two standard drums secured end to end. This was all the patentee disclosed, this was all the Patent Office considered and this is all that was and could be granted as a limited

monopoly in exchange for such disclosure. See *Del Francia v. Stanthony Corporation*, 278 F. 2d 745, 747, wherein this Court stated:

“The claims are a measure of the monopoly granted to the inventor . . . (citing case) and they can never be broader than the invention disclosed to the public.”

Defendant's Hop Packing Operation Bears No Substantial Resemblance to the Process Shown, Described and Claimed in Plaintiff's Patent

The method and apparatus used by defendant in packaging hops in single steel drums are described in the testimony of defendant's Assistant Vice President Shuff at pages 255-265 of Volume III of the record and are shown in Exhibits 28-39. The method is fundamentally different from that described in the patent in numerous respects, particularly in the steps of sawing a single bale in half, removing the burlap covering, superimposing the contents of the two half-bales with more or less hops to make an exactly predetermined weight, and re-compressing the unbaled hops, as contrasted with the steps in the patent of superimposing two elongated farm bales and recompressing them in their original burlap wrappings; followed in the case of defendant, with the steps of applying binding wires or straps, closing the ends of the bale by sewing, and inserting the cylindrical recompressed bale in a single steel drum and applying the conventional lid, as contrasted with the steps described in the patent of placing the elongated recompressed, double bale into *two* steel drums with the flanges around the open ends thereof superposed, and sealing the superposed flanges.

The trial court referred to the defendant's accused method in its fact findings (R. Vol. I, 78, 79, 81, 82) as follows:

“XVII. In 1955 the defendant began its here-accused single drum net weight packaging procedure.

“XVIII. The accused net weight packaging procedure employed by the defendant comprises the steps of sawing a single standard ranch bale in half, and removing the original burlap covering to leave the hops exposed and unrestrained and thereby permit the necessary weight adjustment by the addition or removal of hops. Thereafter, the unrestrained hops of adjusted weight are compressed to a cylindrical form with a new burlap wrapping and after being fastened by metal straps or wires, are placed in a single standard 55-gallon steel drum which is sealed by a conventional lid (Exhibits 28-39).

* * * * *

“XXV. The defendant’s single drum net weight packaging procedure does not literally infringe claim 1 of the patent, since defendant does not compress ‘at least one bale of hops’, but rather unwraps, compresses and bales a sawed-in-half bale of hops of precisely predetermined weight, and defendant utilizes only a single drum rather than ‘two steel drums’. Therefore, to sustain its charge of infringement, plaintiff must rely upon the doctrine of equivalents to obtain a broadened construction of the claim which would include defendant’s single drum net weight packaging method within its patent monopoly.

“XXVI. The defendant’s single drum net weight packaging procedure is fundamentally different from the plaintiff’s patented method, and does not perform the same function in the same way to obtain the same results. Unlike the patented method, the defendant’s procedure destroys the integrity of the original ranch bale so as to permit access to the hop contents and adjustment of the weight necessary for net weight packaging. The defendant’s procedure does not obtain the advantage of the patented method, emphasized by the patentee, Meisler, of maintaining the integrity of the original ranch bales in their original burlap wrapping so as to preclude exposure of the hops and consequent ‘damage to the cones and petals.’ Defendant thus compresses and bales unrestrained blocks of hops intermingled with filler hops to provide a cylindrical bale of hops of accurately controlled predeter-

mined net weight. The defendant's resultant cylindrical bale of predetermined net weight is fundamentally different than the elongated random weight, recompressed ranch bale of the patented method. Similarly, the defendant, by utilizing a single conventional steel drum, does not obtain the advantage of a container which will contain recompressed intact ranch bales in their original elongated form. Moreover, the defendant's considerably more involved and obviously less efficient single drum net weight packaging procedure does not attain the high production rates which are readily attained according to the patented method."

In the light of the evidence and the foregoing findings of fact, the court found (R. Vol. I, 83, Finding XXXIII) "The accused single drum net weight packaging procedure is not the equivalent of the patented method" and stated in its Memorandum Decision (R. Vol. I, 74-75) " * * * I find that there has been no infringement of the plaintiff's patent by the defendant's process, either literally or under the doctrine of equivalency."

QUESTIONS PRESENTED

Defendant submits that the following are the questions presented for determination on this appeal:

1. Is the trial court's fact finding (XXXIII) that the "accused single drum net weight packaging procedure is not an equivalent of the patented method" supported by the evidence (F.R.C.P. 52(a))?

2. Is the trial court's conclusion that claim 1 of the patent in suit cannot be construed to cover, as an equivalent, the accused single drum net weight packaging procedure used by defendant, supported by the facts as established by the evidence and found by the court?

ARGUMENT

No question of *literal* infringement of claim 1 is involved, since, as pointed out by this Court, "Haas is not accused of using a two-drum packing method." (332 F. 2d 910, 915)

Hence, the only matter for consideration is whether the findings and conclusions of the trial court in connection with the doctrine of equivalents are supported by the record.

In *Graver Tank Co. v. The Linde Air Products Co.*, 339 U.S., 605, 609, 610, the Supreme Court said:

"A finding of equivalence is a determination of fact * * * it is to be decided by the trial court and that court's decision, under general principles of appellate review should not be disturbed unless clearly erroneous."

This Court in *Nelson v. Batson*, 322 F. 2d 132, cited the rule of the *Graver Tank* case with approval in Footnote 12 at page 136. The court discussed the fundamental principles of patent infringement as follows (p. 134):

"The statute requires that the patent application contain specifications which describe the invention in 'full, clear concise, and exact terms,' and which conclude with 'one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.' 35 U.S.C.A. §§ 111, 112. The claims measure the patent monopoly, and their language provides the standard against which infringement is initially to be determined. Where, as here, the invention consists of a combination of old elements, the patent monopoly extends only to the combination claimed as required by the statute, and not to its parts; the patent is infringed only if all of the elements set forth in the claim are found in the accused device.

"These are not arbitrary requirements; they serve important and long recognized public interests. Precise claims are required, 'so that the public may know

what they are prohibited from doing during the existence of the monopoly, and what they are to have at the end of the term, as a consideration for the grant.' Brooks v. Fiske, 15 How. (56 U.S.) 212, 214-215, 14 L.Ed. 665 (1853)."

After referring to the *Graver Tank* case and the court-created "anomaly," the doctrine of equivalents, the court said (p. 135):

"Since the purpose of the doctrine of equivalents is to give the inventor an opportunity to secure a just reward for his invention—an opportunity which he would otherwise be denied because of the failure of the language of his claim to include devices which were in fact the same as his own in function, means, and result—the degree of protection afforded beyond the language of the claims will vary directly with the value of the inventor's contribution to the art. As the principle is commonly put, the inventor is entitled to a range of equivalents commensurate with the scope of his invention: broad if his invention is broad; narrow if his advance is a small one in a crowded field."

In that case, as here, the appellant asked the court to disregard the clear language of the claim and to substitute therefor a broad combination of elements which it contended was the "heart" or "essence" of the invention. This court held (p. 137):

* * * "We can only answer, 'that there is no legally recognizable or protected "essential" element, "gist" or "heart" of the invention in a combination patent.' " *Entron of Maryland, Inc. v. Jerrold Electronics Corp.*, 295 F. 2d 670, 677 (4th Cir. 1961), quoting *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 345, 81 S.Ct. 599, 5 L.Ed.2d 592 (1961).

The court concluded (p. 138):

If the "essence" of Nelson's invention was indeed the relationship between the rotatable propulsion unit and the skeg, Nelson should have claimed that combina-

tion separately. "The inventor must 'inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not.'" [citing cases]

Thus, appellant cannot ignore the specific limitation of claim 1, as it seeks to do at pages 20 and 21 of its brief, by referring to what is termed the "essence of the process", consisting of four steps which were never described in the patent application and never presented to the Patent Office. A similar attempt was condemned by this court in *Nelson v. Batson*, *supra*.

The Questions of Equivalency and Infringement Are Questions of Fact and Not of Law

At page 28 of its brief, appellant contends that the questions presented on this appeal are questions of law and not of fact, presumably in an attempt to escape the presumption of correctness which attaches to fact findings of the trial court under Rule 52(a). The cases relied upon do not support the contention. A determination of equivalency or non-equivalency is one of fact, as has been conclusively decided by the Supreme Court in *Graver Tank v. Linde*, *supra*.

This Court's decision in *Del Francia v. Stanthony Corporation*, 278 F. 2d 745, cited by appellant does not suggest a contrary conclusion, but, in fact, supports the proposition.

This Court in *Del Francia*, after the statement quoted at page 28 of appellant's brief, went on to say—

" * * * The claims are a measure of the monopoly granted to the inventor, *The Paper Bag Case*, (*Continental Paper Bag Co. v. Eastern Paper Bag Co.*), 1908, 210 U.S. 405, 419, 28 S.Ct. 748, 52 L.Ed. 1122, and they can never be broader than the invention disclosed to the public. Finally, the specifications and

drawings must be looked to in order to properly grasp the invention or explain any ambiguity in the claims. The specification may not be used to enlarge any claim, but can be used to limit any claim."

In footnote 5 on page 748, this Court said:

"Normally, the question of infringement is one of fact. In this case, however, since there was no dispute as to the construction of the patented broiler and the construction of the accused device, the question of infringement resolves itself into one of law, depending on a comparison between the patent claims and the accused device, and the correct application thereto of the rule of equivalency. *Kemart Corp. v. Printing Arts Research Laboratories*, 9 Cir., 1953, 201 F. 2d 624."

The court applied the classic tests of equivalency and found (p. 749):

" * * * there is a substantial difference in the operation of the flame-creating means or method employed by the patented device and the accused device in accomplishing the desired result. * * *

On the basis of this fact finding, the court held:

"We hold that there is no equivalency of operation between the patented device and the accused device because the principle of appellant's patent has not been appropriated by the appellee. Therefore, the accused device does not infringe upon the patented device."

The decision of the Court of Appeals for the Eighth Circuit in *Solomon v. Renstrom*, 150 F. 2d 805, relied upon by appellant on page 28 of its brief, is utterly irrelevant to any phase of this case. That was not even a patent infringement suit, but was an action under the old statute, R.S. 4915, authorizing actions *de novo* in the district courts to review Patent Office decisions on the question of priority of invention in interference proceedings between rival

claimants. The issue was whether or not the Solomon application for patent contained a disclosure which would enable Solomon to copy claims from the Renstrom patent for purposes of interference. The court specifically held at page 809:

“This is not a suit for infringement and hence, the doctrine of equivalency may not be invoked.”

Appellant relies upon this Court's decision in *Hansen v. Colliver*, 282 F. 2d 66, at page 37 of its brief. This is one of a line of cases in this Circuit holding that, although the question of infringement is normally one of fact, in special situations it may be considered a question of law, particularly where the facts are not in dispute, where there is no disagreement between the expert witnesses and where the function, result and mode of operation of the respective methods or machines are not in issue. Examples of cases following this rule are *Kemart Corp. v. Printing Arts Research Laboratories, Inc.*, 201 F. 2d 624, *Stuart Oxygen Co. v. Josephian*, 162 F. 2d 857, and *Kwikset Locks, Inc. v. Hillgren*, 210 F. 2d 483.

In the latter case, this Court, at pages 488 and 489, reversed the district court's holding of infringement, saying—

“ * * * While it is true that a district court's finding of infringement is generally considered to be a finding of fact that may not be set aside unless clearly erroneous, ‘it is [also] well settled that where, as here, there is no dispute as to the evidentiary facts, and the record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringing process, the question of infringement resolves itself into one of law, depending upon a comparison between the two processes and the correct application thereto of the rule of equivalency. The testimony in this case was largely expository and descriptive of the elements and operation of the two processes and was not disputed.’ *Kemart Corp. v. Printing*

Arts Research Lab., Inc., 9 Cir. 1953, 201 F.2d 624, 627, 628; *United States v. Esnault-Pelterie*, 1938, 303 U.S. 26, 30, 58 S.Ct. 412, 82 L.Ed. 625.”

The present case does not come within the exception to the general rule applied in the above. On the contrary, the finding of infringement by the trial court below was based upon disputed facts and conflicting testimony. There is no dispute as to the method described and claimed in the patent or the method employed by defendant, but the results, functions, advantages, and effects of the two methods were the subject of much conflicting testimony and of diametrically opposed proposed findings of fact submitted by the parties to the trial court.

This court in considering the questions here presented should follow the criteria which it adopted in *Martin v. Be-Ge Mfg. Co. of Gilroy*, 232 F. 2d 530, 532. There, as here, conflicting evidence was presented at the trial. In issue were the function, operation and results of the accused machine and whether it performed the same function as that of the machine shown and described in the patent.

This Court said—

“After hearing all the evidence and viewing motion pictures showing the operation of the accused device, the trial judge, sitting without a jury, listed several differences in structure and operation between appellees’ device and the device of the patent in suit, and found there was no infringement, since ‘the function and mode of operation of the . . . [appellees’] devices differ from the function and mode of operation of the device described and claimed in the Letters Patent sued upon.’ [citing cases]”

“The issue of patent infringement is one of fact. *Stilz v. United States*, 1925, 269 U.S. 144, 147, 46 S.Ct. 37, 70 L.Ed. 202; *Battin v. Taggart*, 1854, 17 How. 74, 58 U.S. 74, 84, 15 L.Ed. 37; *McRoskey v. Braum Mattress Co.*, 9 Cir., 1939, 107 F.2d 143, 147.”

“This Court may not upset a finding of fact of the District Court ‘unless clearly erroneous’, Fed. Rules

Civ. Proc. rule 52, 28 U.S.C.A.; *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 1950, 339 U.S. 605, 609-610, 70 S.Ct. 854, 94 L.Ed. 1097; *Patterson-Ballagh Corp. v. Moss*, 9 Cir., 1953, 201 F. 2d 403, 407; *Refrigeration Engineering v. York Corp.*, 9 Cir., 168 F. 2d 896, 899, certiorari denied, 1948, 335 U.S. 859, 69 S.Ct. 133, 93 L.Ed. 406; *Maulsby v. Conzevoy*, 9 Cir., 161 F. 2d 165, 167, certiorari denied, 1947, 332 U.S. 791, 68 S.Ct. 99, 92 L.Ed. 373; and here there is ample evidence to sustain the finding of non-infringement.' "

To the same effect are *Kim Bros. v. Hagler*, 276 F. 2d 259 (C.A. 9), *Super Mold Corporation of California v. Bacon*, 130 F.2d 860, *Faulkner v. Gibbs*, 170 F. 2d 34, *Patterson-Ballagh Corp. v. Moss*, 201 F. 2d 403.

Appellant contends that the evidence establishes that the patented method and the accused method perform substantially the same function in substantially the same way to obtain the same result. Appellee contends that the evidence has no such effect.

The trial court in its Memorandum Decision (R. Vol. I, pages 70 and 71) noted the following differences in the two methods—

"1. The patented process uses two entire rectangular bales pressed to a circular shape. The defendant's process calls for the sawing in half of a single bale, superposing one half on the other, and pressing to a circular shape.

"2. The plaintiff's process makes no attempt to adjust the weight and each package will therefore vary somewhat in weight. The defendant's process adjusts the weight so that each drum shipped has the same net weight.

"3. In the plaintiff's process, both bales remain unbroken. In the defendant's process, the wrapping of the bale is broken both by sawing and by unwrapping prior to pressing into a circular shape.

"4. The plaintiff's patent specifically calls for the use of two drums as a container; the defendant's process only uses one."

The differences in the functional advantages of the method of the patent in suit and the defendant's single drum net weight packaging procedure were elaborated in the fact findings of the district court, numbers VIII and XXVI, (R. Vol. I 76 and 81) as follows:

“VIII. The principal functional advantages of the plaintiff's patented method of shipping bales of hops are that it (1) maintains the integrity of the original ranch bales in their original burlap wrappers and thus precludes exposure of the hops and consequent damage to the cones and petals, and (2) permits the elimination of the prior art custom built, metal lined containers by substituting therefor two standard steel drums whose combined length when their open ends are superposed, is sufficient to receive the 60-inch long recompressed intact bales.”

* * * *

“XXVI. The defendant's single drum net weight packaging procedure is fundamentally different from the plaintiff's patented method, and does not perform the same function in the same way to obtain the same results. Unlike the patented method, the defendant's procedure destroys the integrity of the original ranch bale so as to permit access to the hop contents and adjustment of the weight necessary for net weight packaging. The defendant's procedure does not obtain the advantage of the patented method, emphasized by the patentee, Meisler, of maintaining the integrity of the original ranch bales in their original burlap wrapping so as to preclude exposure of the hops and consequent ‘damage to the cones and petals.’ Defendant thus compresses and bales unrestrained blocks of hops intermingled with filler hops to provide a cylindrical bale of hops of accurately controlled predetermined net weight. The defendant's resultant cylindrical bale of predetermined net weight is fundamentally different than the elongated random weight, recompressed ranch bale of the patented method. Similarly, the defendant, by utilizing a single conventional steel drum, does not obtain the advantage of a container which will contain recompressed intact ranch bales in their original elongated form. Moreover, the defendant's

considerably more involved and obviously less efficient single drum net weight packaging procedure does not attain the high production rates which are readily attained according to the patented method."

In addition to the disputed facts referred to above, which have been resolved by the trial court, the parties are in disagreement with respect to the prior art cited and the range of equivalents to which the patent is entitled in view thereof. Plaintiff-appellant contended below, and now contends that the prior art acknowledged in the specification of the patent, the prior patents cited by the Examiner, and the newly cited patents and publications relied upon by the defendant are so irrelevant and non-analogous that the patent is entitled to a liberal construction and a broad range of equivalents. Defendant-appellee, on the other hand, contended below that the prior art anticipates the invention and invalidates the patent, or, at least, shows that it is entitled to only the most limited scope.

The trial court resolved this dispute, in its Memorandum Decision, as follows (R. Vol. I, 71, 72):

* * * "In examining the record with respect to the prior art the following facts are clearly established by the record:

1. It is admitted that pressing hops into a desired shape is not new. The long-standing practice in the industry was to press the bales into rectangular shapes.
2. Pressing baled materials of square cross section into a circular cross section is not new. See Patent No. 1,418,441 (Howcott, 1922), Exhibit #73.
3. Using two cylindrical containers fastened together to form a single container is not new. See British Patents Nos. 14,946 (Whatmough, 1898), Exhibit #44; 618,912 (Young, 1949), Exhibit #47; and 624,194 (Shakesby, 1949), Exhibit #48.
4. Using a cylindrical, separable container to store hops is not new. See German Patent No. 7235 (Schmidt, 1879), Exhibit #53.

5. Using a single cylinder for housing baled materials is not new. See U. S. Patent No. 535,751 (Campbell, 1895), Exhibit #58.

“The plaintiff argues for a ‘liberal’ construction of the patent; but, as the patents cited indicate, the intentional crevasse into which the plaintiff’s patent fits is quite narrow indeed. A broad construction in view of the prior art would present a serious question as to the patent’s validity.” * * *

The court in its formal findings of fact referred to the prior art and its limiting effect on the construction of the claims in findings XXIX, XXX, and XXXI. (R. Vol. I, 82, 83)

“XXIX. In addition to the prior art practice of shipping recompressed bales of hops in custom built, metal-lined cases, the permissible construction of the claims of the patent in suit is further limited by the prior art U. S. Patent to Howcott, No. 1,418,441, issued June 6, 1922, the 1948 Hind publication (Exhibit 40), and the 1900 Gross publication (Exhibit 41). None of these prior art publications were before the Patent Office during the prosecution of the patent in suit.

“XXX. The 1922 patent to Howcott discloses the steps of compressing a bale of rectangular cross section into a bale of circular cross section and fastening the bale of circular cross section with wire bale ties.

“XXXI. Both the 1948 Hind publication and the 1900 Gross publication disclose the packaging of a cylindrical bale of hops in a single drum.”

These findings were based on conflicting testimony of the experts for the respective parties and their effect is governed by Rule 52(a).

Appellee submits that, under the rule of *Martin v. Be-Ge Mfg. Co.*, *supra*, the trial court’s determination that the accused single drum net weight packaging procedure is not the equivalent of the patented method and, therefore,

is not an infringement of claim, 1 is a determination of fact and not of law, entitled to the respect and presumption of correctness afforded by Rule 52 F.R.C.P.

Moreover, in making its findings and conclusions, the trial court was mindful of the rules laid down by this court for determining equivalency. In *Del Francia v. Stanthony Corp.*, 278 F. 2d 745, 749, this court said:

“In seeking to determine if the doctrine of equivalents is to apply, it is well to bear in mind the classic definition which requires the accused device to perform substantially the same function in substantially the same way to obtain the same result as that claimed for the patented item. *Sanitary Refrigerator Co. v. Winters*, 1929, 280 U.S. 30, 42, 50, S.Ct. 9, 74 L.Ed. 147.”

The trial court summarized the advantages, functions and results of the patented method (Finding VIII, supra p. 22) as consisting principally in maintaining the integrity of the original ranch bales in their original burlap wrappers and eliminating the elongated metal-lined containers by substituting two standard steel drums whose combined lengths when assembled was sufficient to receive the elongated recompressed intact bales. The court also pointed out in finding XXVI (supra p. 22) that defendant's method did not perform these functions or obtain the same result.

This court in *Moon v. Cabot Shops, Inc.*, 270 F. 2d 539, 543, said:

“In determining the permissible range of equivalents, the court must consider the state of the prior art, the novelty and contribution of the claimed invention, the nature and extent of the differences between the patented and the accused devices, the scope of the claim of the patent and the limitations in it, and other surrounding circumstances. *Long Mfg. Co. v. Holliday*, 4 Cir., 246 F. 2d 95, 100.”

The trial court in the present case considered each of the factors referred to above. The state of the prior art was referred to in the Memorandum Decision (R. Vol. I, 71-72) and in its findings Nos. XXIX, XXX, and XXXI, *supra* p. 24. In the light of the prior art, the court said:

“ * * * as the patents cited indicate, the inventional crevasse into which the plaintiff's patent fits is quite narrow indeed. A broad construction in view of the prior art would present a serious question as to the patent's validity.” (R. Vol. I, 72)

The trial court considered the “novelty and contribution of the claimed invention” as suggested in *Moon v. Cabot supra*. In its Memorandum Decision, R. Vol. I (70), the court said:

“ * * * Meisler conceived the idea of placing one bale atop another in a circular press, pressing the two bales to a circular shape, and then shipping the bales in two fifty-five gallon drums. The method of shipping in the drums is to place the pressed bales in one drum, put the other drum over the top of the bales, and then seal the two drums where they join, which is approximately the middle of the bale.”

The court defined the novelty and claimed contribution of the invention quite clearly and precisely in finding XXXIV (R. Vol. I, 83):

“XXXIV. The only novelty between the patented method and such prior art is the use of two standard or conventional drums secured end to end to contain the elongated cylindrical bale of hops.”

The court covered in detail “the nature and extent of the differences between the patented and accused devices,” as suggested in *Moon v. Cabot, supra*, in findings VII, VIII, XXV, and XXVI (R. Vol. I, pp. 76, 81, brief *supra* 13-14).

The “scope of the claim of the patent and the limitations in it” were considered by this court on the former

appeal 332 F. 2d 910 and by the trial court in its Memorandum Decision (R. Vol. I, 69.) and finding X, XI, XII, XIII, and XIV.

Among the "other surrounding circumstances" which were considered by the court are the prosecution of the original application before the Patent Office and the arguments made by the applicant's attorney in response to rejections, and the admissions made by the inventor during the course of the abortive proceedings on the application for reissue, as outlined in the Memorandum Decision of the court (R. Vol. I, 73, 74) and findings XIX, XX, XXI, XXII, and XXIII.

Thus, the trial court, on remand from this court, determined the permissible range of equivalents to which the patent was entitled with meticulous care and thoroughness and in accordance with the ground rules laid down in this court's earlier decisions.

Appellant Is Confused in Its Citation of Authorities on Patentability in Support of Arguments on Equivalency

Appellant's brief, pages 26, 27, 29, 30, 41, 42, 46 and 47, cites and relies upon prior decisions of the United States courts relating to obviousness, invention, patentability, and validity,—issues which are not involved in the questions presented on this appeal. The purpose of the reliance upon such cases is not apparent, unless it is to becloud the real issues and confuse the court.

The trial court did not pass on validity. If the scope of claim 1 of the patent is properly limited to its terms, appellee does not now challenge its validity. Perhaps it was unobvious to conceive that *two* standard steel drums could be assembled with the flanges around their open ends superposed and sealed, to package two elongated bales of hops which had been recompressed to cylindrical shape, but appellee is not concerned here with such a conception.

The cases cited on the pages referred to above and the quotations therefrom are all concerned with tests and standards for determining the presence or absence of invention, and with questions of patentability and patent validity.

To illustrate appellant's confusion, the brief at pages 46 and 47 refers to recent Supreme Court decisions, particularly *U. S. v. Adams*, 86 S. Ct. 708 (1966) from which it quotes. The brief states with respect to the Adams' case:

"The court below held that the Government's battery had been the equivalent. The Supreme Court of the United States thus holds that the doctrine of equivalency still applies and protects the inventor so he and others will be induced to exercise their ingenuity to the advantage of mankind * * *"

The court held nothing of the kind! The opening paragraph of the Supreme Court's opinion, outlining the history of the litigation, states:

"* * * The Trial Commissioner held that the patent was valid and infringed in parts * * *. The Court of Claims adopted these findings * * * 330 F. 2d 622 * * *. The United States sought certiorari *on the patent validity issue only*. We granted the writ, along with the others, in order to settle the important issue of patentability presented by the four cases. 380 U.S. 949. We affirm." 86 S.Ct. 708, 709.

No question of infringement or equivalency was presented to the Supreme Court. In fact, the court below did not hold that the accused battery "had been an equivalent" as stated in appellant's brief. As appears from the decision of the Court of Claims, 330 F. 2d 622, 626, 627, the Eagle-Picher and Ray-O-Vac battery units were held to infringe claim 1 of the Adams patent but the Burgess battery unit which was *claimed to be an equivalent* of claim 1 was held not to infringe. The decision in the Court of Claims holding the Burgess battery unit not an equivalent sup-

ports appellee's position in this case. However, the issues of infringement and equivalency as to any of the batteries were *not* presented to the Supreme Court.

Consideration of the Proceedings on the Abortive Application for Reissue Requires a Strict Construction of Claim 1

The trial court in its Memorandum Decision (R. Vol. I, 68) referred to this court's statement in its former opinion that the proceedings on the application for reissue might be used in aid of construing the claims (332 F. 2d 910, Footnote 8, citing *Schnitzer v. California Corrugated Culvert Co.*, 140 F. 2d 275, 276-277).

Following the admonition of this court, the trial court, after expressly noting that it was doing so as an aid in construing the claims, did look to the actions of the patentee, Meisler, in his application for reissue and quoted from his reissue oath at page 7 of the Memorandum Decision (R. Vol. I, 74) the following, which also became finding of fact XX*:

"I verily believe the original patent to be partly inoperative or invalid for the reason that the original patent describes my invention as a combination of a method of compressing hops with the step of placing a bale into two steel drums, while actually one steel drum can be used in place of two steel drums without affecting the scope of my invention.

"That I claim that my said Letters Patent is so inoperative or invalid by reason of a defective or insufficient specification in that the specification in the short description of the invention does not indicate

* Appellee notes that on page 12 of its brief appellant inaccurately quotes the trial court's finding of fact No. XX by failing to indicate the omission by asterisks or the like, of the second and third paragraphs thereof which are above quoted. It is perhaps significant that the portion of the finding omitted by appellant includes the patentee's sworn statement "... that the invention as described and claimed is limited to the use of two steel drums . . .".

that the sealing of the bale into two steel drums is an optional procedure.

* * *

“As is apparent from the above, the errors which constitute the inadvertence, accident or mistake relied upon in applying for this reissue, consist in that *the invention as described and claimed is limited to the use of two steel drums*, while actually one drum can be used as effectively as two drums. The absence of claims in the issued patent covering the use of one drum is believed to constitute a most serious inadvertence, accident or mistake.” (Emphasis added) See Exhibit 14, pages 10 and 11.”

The trial court also made specific findings of fact with respect to the broadened specification and claims in the reissue application and the Examiner's rejection thereof. (Findings of Fact Nos. XIX, XXI, XXII and XXIII, R. Vol. I, 79, 80)

Relying solely upon the existence of such findings by the trial court, appellant at pages 12 and 13 of its brief blatantly alleges that the trial court applied the doctrine of file wrapper estoppel in contravention of this Court's previous decision. Such allegations by appellant are simply not so. This is patently clear from the trial court's memorandum decision (R. Vol. I, 68) wherein the trial court: carefully analyzed patent claim 1 (R., Vol. I, 69); considered the “purpose and nature of the patent” as well as the prior art and the relation of the patented method thereto (R. Vol. I, 69-72); the arguments made by the patentee to the patent examiner during the course of the prosecution of the original application (R., Vol. I, 73, 74); and compared the accused method practiced by appellees with the patented method and analyzed the distinctions therebetween (R. Vol. I, 69, 70). It was only after a careful and detailed consideration of all such evidence that the trial court considered the proceedings on reissue, and then only after explicitly noting that it was doing so as an aid in construing the claim. (R. Vol. I, 74) Thus, there

is simply not the slightest basis for appellant's allegation "that the Trial Court did indirectly what this Court previously held that it should not do, namely, apply the doctrine of file wrapper estoppel." On the contrary, it is abundantly clear that the proceedings on reissue were merely relied upon as additional evidence to aid the trial court in construing the claim and that when so considered, the reissue proceedings simply buttressed, as indeed they must, the court's conclusion that the patent claims do not cover the appellant's single drum method.

CONCLUSION

The ruling of the Supreme Court in *Graver Tank Co. v. The Linde Air Products Co.*, supra, and of this Court in *Martin v. Be-Ge Mfg. Co.*, supra, that the questions of equivalency and infringement are fact questions, should be followed in the court's consideration of the questions presented on this appeal.

The trial court's determination of non-equivalency between the accused single drum net weight packaging procedure and the patented method is a finding of fact and should not be set aside unless clearly erroneous.

The trial court applied the proper tests, laid down by this Court in *Moon v. Cabot Shops, Inc.*, supra, in determining the issue of infringement on the basis of the doctrine of equivalents and in finding no infringement. The evidence abundantly supports the finding.

The judgment below should be affirmed.

Respectfully,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

C. WILLARD HAYES,
Attorney

In the
United States Court of Appeals
For the Ninth Circuit

M.O.S. CORPORATION, *Plaintiff-Appellant*,

vs.

JOHN I. HAAS, INC., *Defendant-Respondent*

REPLY BRIEF OF APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

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FEB 14 1967

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In the United States Court of Appeals
For the Ninth Circuit
No. 20750

M.O.S. CORPORATION, *Plaintiff-Appellant*,

vs.

JOHN I. HAAS, INC., *Defendant-Respondent*

**REPLY BRIEF OF M.O.S. CORPORATION,
APPELLANT**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

STATEMENT OF THE CASE

Under this heading, the appellee makes three principal points:

First, appellee asserts there is no evidence to support the alleged commercial impact of the patented process. Counsel, of course, overlooks here testimony cited in our statement of the case.

Secondly, appellee asserts, that the process shown, described and claimed in the patent in suit is not the single drum net weight process of appellee, but relates strictly and solely to the double drum process—a designation not used in the patent (Ex. 1), but used by appellee to justify a difference where none exists in reality.

Thirdly, appellee contends that defendant's hop packing operation bears no substantial resemblance to

the process shown, described and claimed in plaintiff's patent. Appellee here simply relies upon findings prepared and submitted by the appellee and adopted by the court in which minor differences are set forth at great length and erroneously interpreted to constitute a substantial and material difference.

Contrary to appellee's assertion, there is substantial evidence to support the contention of appellant that the patented process did have a substantial commercial impact (R. 150 et seq.). See the references contained in our opening brief on this, none of which does appellee advert to or discuss. The essence of the process described and claimed in the patent (Ex. 1) in suit is the recompression of western farm bales into circular form so as to fit a standard drum or drums so that the same can be sealed and conveniently shipped, thereby being protected against moisture and other deleterious matter in the atmosphere.

QUESTIONS PRESENTED

The selection of questions and phrasing thereof by the appellee clearly show that it is creating a distinction which does not exist in reality by referring to the defendant's process as a single drum net weight packaging procedure. He is making a distinction between the use of one drum or more than one drum as to which the essence of the process patented does not in truth differ. By making this erroneous assumption as to the basic question involved, appellee in fact begs the

question. We submit that the questions presented and stated in appellant's opening brief fairly state the issues which this court is to consider.

ARGUMENT

Appellee here makes four points:

I.

Equivalency Question of Law

In view of the findings prepared by defendant which were adopted by the court, appellee naturally contends that the questions of equivalency and infringement are questions of fact and not of law so as to avail appellee of the argument that the trial court's findings are normally binding upon the appellate tribunal. However, the law appears to be to the contrary. Counsel does not comment upon the Supreme Court decision of *Williams Mfg. Co. v. United Shoe Machinery Corp.*, 121 F. 2d 273, affirmed in 316 U. S. 364, or upon *Singer Company v. Cramer*, 192 U. S. 265, where the Supreme Court of the United States stated:

“* * * the question of infringement or no infringement is one of law and susceptible of determination on this writ of error.”

These are words of the Supreme Court, not the appellant here, as implied by appellee in appellee's brief. Furthermore,

“the interpretation of the claims of a patent is * * * a question of law for the court.” *Solomon v. Renstrom*, 150 F. (2d) 805.

Compare *No-Joint Concrete Pipe Co. v. Hansen*, 344

F. 2d 13 (9th Cir. 1965), where this Court apparently does not agree with appellee's contentions. In *Industrial Instrument Corp. v. Foxboro Company*, 307 F. 2d 783, (5th Cir. 1962), the Court, in addressing itself specifically to this point in a case in which it reversed the lower court's holding on equivalency, said:

"We may reverse free of the clearly erroneous rule where as is the case here, the issue revolves around an ultimate fact question as distinguished from subsidiary fact questions, or where mixed questions of law and fact are presented when there is error as to the law."

Similarly, here, the subsidiary fact questions, that is, those relating to precisely which method the defendant used, are not here in issue. It is the ultimate factual conclusion that the doctrine of equivalents does not apply that is the contested issue on appeal.

We think these authorities answer appellee's contentions under this head. Under this same head counsel continues to argue that since defendant's process uses only one drum whereas plaintiff's patent specifically calls for the use of two drums that the doctrine of equivalency cannot apply and that the finding of the trial court in this respect is binding upon this court. But the essence of the process which was patented is not whether one or two drums were used, but whether or not there is a recompression in circular form so as to take advantage of the existing standard drum so that it can be economically sealed and shipped and the contents thereby protected. Nowhere does the appellee re-

fute our contention in this respect. Various details as to whether the bale is cut with one half laid upon the other or whether the bale is adjusted for weight by selection of the original bale or by trimming the cut bale is immaterial or at most is an improvement, which, if patented, cannot be used without infringing the original patent. See appellant's brief, page 35, et seq. Whether the bale is held in a circular form before insertion in the drum by steel straps or by wire would likewise be immaterial to the essential process disclosed by the patent and made available to the industry. With the advent of the Meisler invention there was a distinct and important economic impact on the industry (R. 150, et seq., prior case). Mr. Gannon, a well known banker and hop grower, stated:

"Q. Now do you feel there are some economic advantages to the patented process that Mr. Meisler has of converting rectangular bales into ones with circular cross-sections, and placing them in drums?

A. Well, only—only so that they fit into the drums. If you had a square drum, why the square bale would do the job.

Q. It takes advantage of a commonly available drum, namely, the oil drum?

A. That is right, and getting it heremetically sealed.

Q. And you feel that there are economic advantages in that?

A. Very definitely, and the trade apparently is willing to pay for it.

* * *

THE COURT: Mr. Gannon, I understand you to say, in discussing the advantage of this method of

packing or recompressing—you said it was of an advantage particularly because of the seal?

THE WITNESS: Yes. No package have we ever been able to make economically since the cost of lead linings went up so high, have we been able to get the seal as with the round drum on account of the cost of drum. We gave up lead packaging in the wartime, and metal packaging and we have been packaging with waterproof papers and some of the plastics.

THE COURT: So that the advantage of the packing is that it utilizes an available container, namely, the drum?

THE WITNESS: That is right.

THE COURT: Which because of its construction may be sealed?

THE WITNESS: That is right. When hops go across the Equator, there is quite a loss of value if there is any air movement in those hops. It has been particularly advantageous in the hops that do go to the Southern Hemisphere."

Counsel asserts that no one else prior to the defendant had utilized the single drum. However, the record shows that even the defendant itself had ordered the single drum from appellant, and thus Finding 15 and counsel's statement on page 10 of appellee's brief is contrary to the only evidence on the subject (R. 86, 87, prior case). The fact that the appellee at that time paid to appellant a royalty for the use of the patented process in connection with a single drum would seem to be a clear admission by appellee that the appellee's process is the equivalent. Certainly, paragraph 15 of the finding and the statements of counsel on page 10 of appellee's brief are wholly without foundation.

II.

Patentability and Equivalency

The next point which counsel makes is the contention that appellant is confused in its citation of authorities on *patentability* in support of arguments on *equivalency*. Of course, the concept of infringement and the concept of equivalency are related in the sense that if the accused process is equivalent to the patented one then there is infringement even though the accused process does not read upon the exact process described or disclosed in the patent. The *Adams* case (86 Supreme Court 708, 1966) is cited because it is a very recent case showing that even though an article does not literally read upon the invention disclosed by the patent there nevertheless is or can be infringement. To say that no question of infringement was presented is completely to distort the opinion of the Supreme Court and of Justice Clark in that case. We certainly invite this court's attention to the *Adams* case and its companion.

But, contrary to appellee's criticism, the material quoted on page 46 of appellant's brief is pertinent. In particular, the Court is suggesting by implication that the claims are to be broadened if the invention warrants a broadened interpretation. The Court of Claims had held (*Adams v. United States*, 330 F. 2d 622, at page 626) that the claims need not be restricted to the type of electrode described in the specification of the patent. It is this broadened reading of the claims which

was affirmed by the Supreme Court in holding the patent valid. It is this broadened reading, too, that is pertinent to the issues in the case at bar since the appellees have argued that unless the patent is narrowly construed it would have to be held invalid.

We think, therefore, that it is important to consider the *Adams* case in the decision to be made here.

III.

Reissue Application

Appellant asserts a contention which we thought was determined adversely to appellee by the prior decision in this case by this court, namely, that the application for reissue requires a strict construction of Claim 1 (Ex. 1). By making this assertion appellee is admitting the contention made in our opening brief that the essence of appellee's position and the position of the court below was in effect to apply the doctrine of file wrapper estoppel without expressly saying so contrary to the prior decision of this court. Counsel cites no authority in support of his contention that the application for reissue requires a strict construction. To be sure, it may be considered in determining the extent of the original claim, but if in truth the original claim discloses an invention which is the equivalent of the process employed by the defendant, the fact that there was an application of reissue, albeit denied for lack of timely filing, the court should nevertheless find that there was infringement. In other words, the case should turn upon the extent or scope of the original claim and

whether or not the defendant's process is the equivalent, for, if so, there is infringement. The application for reissue in this instance becomes immaterial once the court determines that the defendant's process is the equivalent of Claim 1 of Ex. 1.

IV.

Equivalency and Infringement

Appellee contends that the doctrine of equivalency does not apply. We have pointed out in our opening brief the reasons why it does apply, and in response to counsel's arguments we would like to cite the recent case decided by this Court: *No-Joint Concrete Pipe Co. v. Hansen*, 344 F. 2d 13 (9th Cir. 1965). In that case this Court reversed the District Court's decision holding that appellant's patent was not infringed. The decision is on all fours with the subject case and seems to dispose of the principal arguments raised in appellee's brief. That case is primarily concerned with whether or not the doctrine of equivalents should be applied where the patent claim called for a two piece core and the infringer used a one piece core. Specifically, the claim calls for an inner form comprising (1) a lower *movable* member and (2) a (stationary) upper member composed of a plurality of sections *releasably* secured together. The defendant used a single stationary core piece. Thus not only did defendant use one piece instead of two but its one piece operated differently than one of the two pieces of patentee's form. In addition, the appellee there argued as does the ap-

pellee here that the accused process was an improved one and therefore could not be considered equivalent. Indeed, the movable member of plaintiff's device performs a "trowelling action" which was absent from the accused device. In the latter device, this function was carried out by means of appellee's mechanically activated and *patented* consolidating rings. Because of the nature of the differences between the two devices it is clear that the 9th Circuit in *No-Joint* was required to make a more drastic application of the doctrine of equivalents than it need do in the subject case. In the subject case the only difference between the accused device and the patented claim is the fact that the container for the recompressed hops in the claim is comprised of two standard sized steel drums whereas on the accused process which uses a smaller bale a single standard sized steel drum is used with the drum lid being substituted for the second drum. In both cases the function of the elements in question is the same, namely they contain the recompressed hops and in both cases the advantage is the same, namely that standard sized drums are used as containers. No particular patentable significance can be attributed to the use of a bigger container or a smaller container as the case may be or the use of two drums instead of one drum. The result is the same, the method of achieving the result is the same and the elements perform the same function in achieving that result. The remarks on page 18 of *No-Joint* with respect to the advantages achieved by

the respective methods of appellant and appellee in the *No-Joint* case seem particularly pertinent to the subject case.

In *No-Joint* as well as in the case at bar, appellee raised a file wrapper estoppel issue. Again it appears that the plaintiff in *No-Joint* had a considerably more difficult position to maintain on the estoppel issue. In particular, the applicant in that case *cancelled* broad method claims and apparatus claims from his original application. Furthermore, he cancelled a claim which would have been literally infringed by the defendant. Nevertheless, the Court found that there was no file wrapper estoppel. The court noted that the narrowing of claims was not for the purpose of avoiding prior art devices which had "movable lower inner form." The Court stressed (page 18) that the movable portions had been claimed from the outset. Similarly, Meisler claimed from the beginning the two drum approach and did not narrow its claim from a one drum application to a two drum application because of any prior art. Indeed, while it might be a different story if appellee had duplicated what the prior art had showed in using its one drum method, it can not rely on the one drum method because the prior art never showed it.

Appellee stresses to a considerable degree, certain differences in the method used by appellee in packaging its hops. These differences were also apparently erroneously relied on by the Court. The fact that the appellee removed the burlap covering from the bales of hops,

that it cut each bale in two, that it added additional hops to achieve a particular weight is totally irrelevant to the issues in this case. The method as claimed by Meisler does not *exclude* any of these things. The claim is in fact broad with respect to such variations and they do not in any way affect the issue of infringement. The sole question is whether the claim should be construed so narrowly as to exclude the one drum method from the coverage of the claim.

While the appellant has argued and shown in its initial brief that it is entitled to a *broad* range of equivalents because of the nature of the invention and the dramatic change that it produced in the hop producing industry of the Northwest, it does not need a broad range of equivalents to support its position that appellee has here infringed. Even if it be held that appellant is only entitled to a narrow range of equivalents, to hold that the use of one drum is equivalent to the use of two only requires a narrow application of the doctrine of equivalents. It has always been standard practice for a court to find that the use of one member in place of two is an equivalent. The cases cited in Footnote No. 2 in *No-Joint* all support this point. In this connection Judge Learned Hand's comment in *Royal Typewriter Co. v. Remington Rand*, 168 F. 2d 691, 693 (2nd Cir. 1948) seems particularly pertinent. There he stated:

“Furthermore, although we are chary of all objective absolutes in the field of patents, reliance upon which has done more to conceal and confuse the subject than anything else, courts have with

curious unanimity held that it does not avoid infringement to combine into one member that which the patent discloses as two, if the single member performs the duties of both in the same way. The decisions are so numerous that we confine ourselves to citing those which over the last thirty years we have passed ourselves."

From the foregoing, it is clear that the doctrine of equivalency does apply; that the claims of the patent, properly interpreted, cover the specific method employed by the appellee, and that therefore the use of such method by the appellee constitutes infringement.

CONCLUSION

We think it clear that the defendant has employed the process disclosed by the appellant's patent and had done so to his substantial economic advantage. We think it equally clear that the economic success of the appellant's patent as the cases cited so hold assist the court in determining not only patentability, but also the scope of the claim and the equivalency of the defendant's process.

We respectfully submit that the decree of the trial court should be reversed and an order should be entered directing the appellee to account.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

No. 20756✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRIDGE CORPORATION OF AMERICA,

Appellant,

vs.

THE AMERICAN CONTRACT BRIDGE LEAGUE, INC., *et al.*

Appellees.

APPELLANT'S OPENING BRIEF.

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No. 20756

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRIDGE CORPORATION OF AMERICA,

Appellant,

vs.

THE AMERICAN CONTRACT BRIDGE LEAGUE, INC., *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement Regarding Jurisdiction.

The Second Amended Complaint contains three causes of action. The jurisdictional basis of the first is 15 U.S.C. 1, 2, 15 (an Act to protect trade and commerce against unlawful restraints and monopolies), and 28 U.S.C. 1337. [Tr. p. 132.] Defendant, The American Contract Bridge League, Inc. (hereinafter called ACBL), conducts an interstate business. [Para. 8; Tr. p. 141.] The Relevant Market [Para. 12; Tr. p. 143] is the business of providing personnel and equipment for scoring sectional and regional duplicate bridge tournaments throughout the United States. Plaintiff Bridge Corporation of America began to conduct its business in interstate commerce. See Reporter's Transcript of proceedings, page 49, line 22 *et seq.*, containing offer to clarify complaint in this connection, should any doubt exist.

The second cause of action parallels the first but is based upon California Business and Professions Code, Sections 16700 to 16758, inclusive, commonly known as the Cartwright Act. [Tr. p. 146.] The basis of jurisdiction is diversity, 28 U.S.C. 1332. The matter in controversy is alleged to exceed the sum of ten thousand (\$10,000) dollars, exclusive of interests and costs, and is alleged to exist between citizens of different states.

The third cause of action is for interference with prospective business advantage and is likewise based on the diversity statute, 28 U.S.C. 1332.

On December 16, 1965, the District Court granted defendants' motion to dismiss plaintiff's second amended complaint as to all counts. [Tr. p. 173.] On January 3, 1966, judgment was filed and entered [Tr. p. 175], dismissing the first cause of action for lack of subject matter jurisdiction, dismissing plaintiff's second and third causes of action for failure to state a claim upon which relief can be granted, and granting defendants' costs. Notice of appeal was filed January 14, 1966 [Tr. p. 177], appealing both from the order and from the judgment. Appellate jurisdiction is based upon 28 U.S.C. 1291.

Concise Statement of the Case.

The basic issue is what *types* of interstate commerce, if any, are exempted from the antitrust laws of the United States; what types of intrastate commerce, if any, are exempted from the Cartwright Act; and finally, as a matter of law, does the third cause of action *on its face* preclude plaintiff from trying before a jury unreasonableness of defendants' interference, etc. (*A jury trial has been demanded.* [Tr. p. 2.])

The memorandum opinion of the District Court is as follows:

"... the conduct complained of does not constitute *the kind* of 'trade or commerce' contemplated by the Sherman Act, and although not previously discussed, for the same reasons it would appear that it does not constitute 'trade or commerce' as contemplated by the Cartwright Act. With reference to the plaintiff's third cause of action, the court has already *ruled* [found as a fact?] that the restriction as to the recording of master points is *reasonable and logical* under the circumstances, and is permissible." [Tr. pp. 173-174.] (Emphasis added.)

The issues are presented by virtue of the court's dismissal of all three causes of action without leave to amend.

Specification of Errors.

1. The District Court erred in holding that the conduct complained of does not constitute *the kind* of trade or commerce contemplated by the Sherman Act.

2. The District Court erred in holding that the conduct complained of does not constitute *the kind* of trade or commerce contemplated by the Cartwright Act.

3. The District Court erred in holding that the restrictions or restraints imposed upon commerce by defendants was reasonable and logical under the circumstances.

4. The District Court erred by improperly relying upon certain precedents.

5. The District Court erred because it failed to apply applicable precedents.

6. The District Court erred because it made a finding of fact, namely, reasonableness, and accordingly usurped the province of the jury.

7. The District Court thus erred in depriving plaintiff of its right of a jury trial.

8. The District Court erred because the conduct complained of is in fact a *per se* violation, namely, a group boycott, in which case reasonableness is no defense.

9. The District Court erred in granting defendants' motion to dismiss, and causing the judgment of January 3, 1966 to be filed and entered.

10. The District Court erred in dismissing the first cause of action for lack of subject matter jurisdiction.

11. The District Court erred in dismissing the second and third causes of action for failure to state a claim upon which relief can be granted.

12. The District Court erred in awarding costs to defendants.

ARGUMENT.

Introduction.

Some background information must be understood in order to relate the competitive positions of the parties.

It has been estimated that there are thirty-five million bridge players in the United States. Bridge is of two types: rubber bridge and tournament bridge. In rubber bridge the players themselves keep and total their scores, decide the winner, and pay and collect losses and winnings accordingly. There is no problem at all regarding the scoring of *rubber bridge* since scorekeeping is a matter of simple addition and subtraction.

Tournament bridge is conducted upon an entirely different basis. It involves the use of so-called duplicate boards. Whereas in rubber bridge the players throw their cards together in the center of the table as played, in tournament bridge the cards of the players are kept separate at all times so that the four sets of thirteen cards *as dealt* can be placed in pockets of a duplicate board and passed on to other tables for play by others. Each player simply turns his cards face down in front of him. A typical session of duplicate bridge involves playing 26 or 28 hands or "boards". Competition ordinarily is by pairs of players who play different boards against different pairs.

Scoring a duplicate bridge tournament is something altogether different from scoring rubber bridge, and is *not a mere matter of addition and subtraction*. The basis of *match point* scoring is to compare for each hand or board the results achieved by each pair with respect to those achieved by the others. Thus for each hand or "board" a pair receives one point for every pair

that it beats on a particular board and one-half point for every pair that it ties. See, for example, The International Code, Laws of Contract Bridge. [Tr. p. 137, line 12.] The match point scores achieved by the pairs on each of the 26 or 28 hands or boards are then cumulated, and the pair having the highest total of *match points* (not bridge points) wins.

"Match pointing" each of the numerous boards is a highly skilled art when done manually. Years of experience are required in order to gain proficiency.

It takes a substantial staff to tabulate the bridge scores during the tournament, and at its conclusion manipulate the bridge scores to assign match point values thereto. If there are six hundred tables in play, there may be as many as seventy or eighty people performing the task of tabulating, match pointing and cumulating.

The Role of the ACBL.

The defendant ACBL was organized as a nonprofit, non-stock New York corporation [Tr. p. 85 *et seq.*] presumably for the purpose of fostering the development of bridge throughout the United States. Its quite legitimate function was to devise some way of ranking about two hundred thousand duplicate bridge players and classifying them according to their achievements as Life Masters, Senior Masters, Junior Masters, etc. The ACBL itself conducts only three tournaments a year. But hundreds of thousands of tournaments are conducted each year by others. The problem arises, how can the credits for winning these various tournaments be as-

signed? Defendant ACBL devised the method of rating the various tournaments, and awarding "Rating Points". Thus the winning players are given "Rating Points" for winning all types of tournaments, and these awards are tabulated by an IBM machine in the New York offices of defendant ACBL. Lists are published periodically, and players thus achieve the Life Master, National Master, or other status presumably commensurate with their achievements. It must be noted that *plaintiff has no connection or interest whatsoever in how these credits are awarded*. Plaintiff's only interest is in performing the task of tabulating, match pointing and cumulating duplicate bridge tournaments, and *determining* the winners. What credits the winners are given is no concern of plaintiff. Whether the players are called Life Masters or Universal Masters is immaterial.

However, the credits are highly sought after. Bridge players travel throughout the country to attend the biggest tournaments so that they can amass the greatest number of credits and corresponding status. If these credits were not awarded, the players simply *would not participate*. Just how important the credits are is perhaps incomprehensible to one not caught up with the fever. However, in the New Yorker Magazine, September 8, 1956, Volume 32, page 72, at page 74, Alfred Sheinwold, the Los Angeles Times bridge columnist and internationally recognized expert, was quoted: "The master point is the be-all and end-all of tournament play." Without these credits, tournament bridge would

fall apart. The control of these awards by the ACBL and the power to withhold them is the immense tool used by the ACBL in carrying out its monopolistic practices.

How is bridge organized by the ACBL under its award system? The District Court in its first memorandum opinion [Tr. p. 128] stated:

“ . . . The League is the corporate combination of several hundred membership associations, or corporations, which plaintiff calls units, which are chartered by the League and are thereby given the exclusive right to conduct duplicate bridge tournaments in their particular areas.”

The individual units have jurisdiction over the various privately owned duplicate clubs in their area, and these private duplicate clubs in turn are authorized to issue minor awards which figure in the award system. See Stoddard affidavit. [Tr. p. 100, line 25 *et seq.*] The three so-called National Tournaments conducted by the ACBL itself are traditionally held in the spring, summer and fall. Since these are conducted by the defendant ACBL itself, plaintiff concedes at this time that the ACBL itself can for these tournaments choose just what means it will use to convert bridge scores to match points, etc. But large and important tournaments, namely, regional and sectional tournaments, are run by the *units themselves* or groups of units under *their own management*. Large sectional and regional tournaments are normally scheduled during the weekends, and many such sectional and regional tournaments are simultaneously scheduled in various places throughout the United States. Local sectional, regional and national tourna-

ments are defined in the Second Amended Complaint. [Tr. p. 134, line 11 *et seq.*]

Yet the defendant ACBL is not content with confining its business activities to the recording of the awards and the running of its three National Tournaments a year as set forth in its charter. [Tr. p. 85.] Instead, it pervades every facet of the business conducted by the units and provides supplies, equipment, trophies and numerous other goods and services for all bridge activities in the United States, and as more particularly set forth in paragraph 5 of the Second Amended Complaint. [Tr. p. 135 *et seq.*] The nature of its activities may be partially appreciated by a consideration of its six-months statement [Ex. C appended to the Affidavit of Fred Flam; Tr. pp. 126-127.]

The Plaintiff's Business.

Aware of the growth of tournament bridge and aware of the immense problems of tabulating bridge scores, converting them to match points, etc., plaintiff developed a specialized digital computer and accompanying paraphernalia (hereinafter called "computer") [see Ex. A; Tr. p. 46] designed to compute, calculate and record the match points. [Para. 3 of Amended Complaint; Tr. p. 133.] Thus with the aid of plaintiff's equipment, all that is necessary is to feed into the machine the *bridge* scores, and the product of the machine is the cumulated *match point* score of all of the plays *printed out in the order of finish*.

Bearing in mind the great mass of data involved, the feat performed by this specialized computer is truly phenomenal. The total investment in the computer to the date of filing of the complaint is fifty-nine thousand

one hundred thirty-three dollars and sixty-eight cents (\$59,133.68). See paragraph 30, Second Amended Complaint. [Tr. p. 150.] About April 1963, the computer was completed and field tested, and demonstrated to various units. Plaintiff then offered and now offers the service of scoring duplicate bridge tournaments at a certain fixed fee per table. The first arrangement was concluded with the Riverside-Redlands units for their sectional to be conducted November 1, 2 and 3 of 1963. See Second Amended Complaint, paragraph 27. [Tr. p. 148.] Paragraph 28 of the Second Amended Complaint is here repeated:

"28. Plaintiff is informed and believes, and upon said information and belief alleges that during or about the month of August, 1963, and prior to September 1, 1963, League and Landy, without justification, wrongfully and maliciously interfered with and prevented said prospective profitable business relationships and advantages to plaintiff by, among other things, unjustifiably, unlawfully and maliciously preventing the consummation of the said reasonably expected business relationships and the contract then anticipated between the manager and directors of the said Riverside-Redlands Duplicate Bridge Tournament, and plaintiff, by advising and directing the said directors and managers that they could not contract with plaintiff for the use of its said digital computer, and that if they did contract with plaintiff for the use of said digital computer and use the same, that League would not record or score the master points of the competitors who competed in said tournament.

"Upon receiving said advice and direction, the said tournament managers and directors declined

to use the said digital computer in the scoring of the match points at the said tournament, although otherwise, the said manager and directors approved the said computer, believed that it was satisfactory in every way, and was extremely valuable to them, and would have used the same."

Defendants made clear to all concerned that should any organization utilize plaintiff's specialized digital computer, no awards would be given. The award system being what it is, and virtually all tournament bridge being subject to the award system of the ACBL, plaintiff's business was then and there laid to rest. Yet plaintiff is ready willing and able to carry out its business. [Tr. p. 9, line 27 *et seq.*]

Subject Matter Jurisdiction.

Plaintiff's first cause of action was dismissed because of "lack of jurisdiction over the subject matter", not that it failed to state a claim upon which relief can be granted. The subject matter of the first cause of action is interstate commerce, both the interstate commerce of plaintiff and the interstate commerce of defendant ACBL. Moreover, jurisdiction was properly pleaded under the applicable sections of the antitrust laws of the United States. To affirm the lower court would seem to be tantamount to a holding that the laws of Congress create rights without remedies, and that 28 U.S.C. 1337 is a nullity.

A somewhat analogous situation was presented in *Spohn v. United States* (D.C.S.D. N.Y. 1954), 16 F.R.D. 240. The plaintiff invoked the Federal Tort Claims Act, and defendant moved to dismiss for lack

of jurisdiction over the subject matter. At page 241, the court stated:

"I feel that it is highly undesirable, if not impossible, to rule upon such a question in the absence of sufficient facts. As the court said in *Montgomery Ward & Co. v. Schumacher*, D.C., 3 F.R.D. 368, 370, involving a similar motion:

'* * * the Court should have open to it a wider vista than presented within the four corners of the pleadings, before determining the important question as to whether the plaintiff shall stay in court or not.'

"The court there deferred the ruling on the motion to dismiss until the facts should be before it, pursuant to Rule 12(d). Cf. *Hawn v. American S.S. Co.*, D.C., 26 F.Supp. 428; *Kaus v. Huston*, D.C., 35 F.Supp. 327; *Equitable Life Assurance Society of United States v. Kit*, D.C., 26 F.Supp. 880."

The only commerce not within the antitrust laws are baseball and those specifically exempted such as by the statute itself. (15 U.S.C. 17.) Moreover, this is not a "baseball" case.

The Kind of Commerce Congress Had in Mind.

The commerce of plaintiff is the advertising of plaintiff's services by the use of interstate publications, by the aid of the mails and otherwise, the transportation of plaintiff's digital computer and other paraphernalia across the borders of the several states to the sites of the various tournaments, and the performance of services at the sites of various tournaments in the several states of the United States.

True enough, this type of business may not have been "specifically" contemplated by Congress when it enacted the antitrust laws. (But was airmail contemplated by the constitutional framers when the post office was established?) Surely because plaintiff's commerce is in the nature of a service does not exempt it from the classification of a trade within the purview of the antitrust laws. In *United States v. National Association of Real Estate Boards*, 339 U.S. 485, at page 490 Mr. Justice Douglas stated:

"... The fact that the business involves the sale of personal services rather than commodities does not take it out of the category of 'trade' within the meaning of §3 of the Act. The Act was aimed at combinations organized and directed to control of the market by suppression of competition 'in the marketing of goods and services.' "

See also *United States v. Shubert*, 348 U.S. 222. Chief Justice Warren framed the issue thus, at page 226:

"... The question presented is thus a narrow one: whether the business of producing, booking, and presenting legitimate attractions on a multistate basis constitutes 'trade or commerce' that is 'among the several States' within the meaning of those terms in the Sherman Act."

After citing and discussing a number of cases, Mr. Justice Warren stated, at page 226:

"These decisions, apart from Federal Base Ball and Toolson, make it clear beyond question that the allegations of the Government's complaint bring the defendants within the scope of the Sherman Act, even though the actual performance of a legitimate stage attraction 'is of course a local affair.' "

Accordingly, whether or not actual playing of duplicate bridge may be a local affair, selling playing cards surely isn't, nor is the interstate business of providing personnel and equipment for performing the intricate task of converting bridge scores to match points.

In *United States v. E. I. du Pont de Nemours and Company*, 351 U.S. 377, Mr. Justice Reed at page 385 stated:

"The Sherman Act has received long and careful application by this Court to achieve for the Nation the freedom of enterprise from monopoly or restraint envisaged by the Congress that passed the Act in 1890. Because the Act is couched in broad terms, *it is adaptable to the changing types of commercial production and distribution that have evolved since its passage.* Chief Justice Hughes wrote for the Court that 'As a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.' " (Emphasis added.)

Whether or not this is a case of first impression [Memo. Opinion; Tr. p. 129], the lower court's holding that this type of commerce is not within the purview of the antitrust laws would seem to be "judicial legislation".

Improper Precedents.

Defendants have heavily relied upon *Apex Hosiery Co. v. Leader*, 310 U.S. 469, to establish that the restraint in question is not the type contemplated by the Sherman Act. Defendants have relied heavily upon *Liebertal v. North Country Lanes, Inc.* (2 C.A. 1964), 332 F. 2d 269; and *Page v. Work* (9 C.A. 1961), 290

F. 2d 323, for the proposition that only intrastate commerce is involved.

The well-known *Apex Hosiery* case involved a suit by a hosiery company against a union. The hosiery company claimed that the union committed serious *trespasses* resulting in a plant shut-down, with consequent "restraint" of interstate commerce. This case is easily distinguishable. Thus it is one thing physically to interfere with the flow of goods in commerce by typical tortious conduct, and it is quite another to interfere with the free interplay of *market forces*. It is the free interplay of *market forces* which concerns the Sherman Act, not physical trespasses. If plaintiff were complaining that the defendants came to the place of business of plaintiff and mutilated plaintiff's equipment, *Apex* might apply. But that is not the case. Plaintiff is complaining that the defendants have interfered with the free interplay of *market forces* involving the plaintiff's goods or services and, accordingly, the Sherman Act does apply: *Apex* is of no consequence.

Page v. Work and *Lieberthal v. North Country Lanes* are clearly distinguishable. In *Page v. Work*, the only commerce involved was the publication of a legal newspaper in Los Angeles County. The interstate incidents of the publication of this newspaper in Los Angeles County were entirely inconsequential. Accordingly, the court properly concluded that the commerce involved was intrastate, not interstate.

In *Lieberthal*, the court held, at page 271:

"The operation of bowling alleys, *without more*, must be held to be a wholly intrastate activity."
(Emphasis added.)

In the present case there *is more*; plaintiff has designed its digital computer and accompanying paraphernalia for the specific purpose of servicing sectional and regional tournaments *throughout the United States* wherever they may be held. This surely contrasts with *Lieberthal*.

The District Court misplaced reliance on *Molinas v. National Basketball Association* (D.C.S.D. N.Y. 1961), 190 F. Supp. 241. This case is distinguishable at the outset because there *was a trial on the merits* and a determination of the factual issue as to whether or not a certain course of conduct of the defendants was reasonable. In the *Molinas* case, the court stated, at page 245:

“Thus it is apparent that the plaintiff has not *presented sufficient proof* to make out a claim upon which relief may be granted.” (Emphasis added.)

If one is to follow the *Molinas* case, at least the plaintiff should be allowed the opportunity of presenting proof. In passing, it may be noted that the court found reasonable its rule to suspend players who had placed wagers on games in which they had participated. And the court found that it was absolutely necessary (clear business purpose) for the preservation of the sport of basketball to prohibit such conduct. Obviously the future of tournament bridge is not at stake by substituting machine scoring for hand scoring methods. Duplicate bridge will continue. Track meets continue despite the substitution of new computerized timing devices.

Local Application of Pressure.

It is submitted that by promulgating its edict to refuse awards, the defendants applied the restraint throughout the entire area of the United States and thus in interstate commerce. But if one were to consider only the application of pressure as it pertains to the Riverside and Redlands units, then a case of restraint of interstate commerce yet exists. See *United States v. Women's Sportswear Mfg. Ass'n*, 336 U.S. 460, at page 464:

"The trial court appears to have dismissed the case chiefly on the ground that the accused Association and its members were not themselves engaged in interstate commerce. This may or may not be the nature of their operation considered alone, but it does not matter. Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. *If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.*" (Emphasis added.)

ACBL — a Trade Association.

The relationship of the several hundred units to the American Contract Bridge League is that of members in a trade association. Yet the defendants have argued that the various units are part and parcel of the national organization, and that there is but one conglomerate

whole. But we must accept the District Court's opinion [Tr. p. 128] :

"... The League is the corporate combination of several hundred membership associations, or corporations, which plaintiff calls units, which are chartered by the League and are thereby given the exclusive right to conduct duplicate bridge tournaments in their particular areas."

The ACBL merely *suggests* a form of government of the several hundred units. [Tr. p. 120.] Proposed By-Laws incorporate the following significant provisions [Tr. p. 123] :

"8. *Power and Duties*

In addition to the powers granted by other provisions of these By-Laws and by the Laws of the State of, the Board of Directors shall have the following powers and duties :

- (a) To acquire, hold, administer, maintain and dispose of all the property of the Unit;
- (b) To appropriate the funds of the Unit for the purpose set forth in these By-Laws;
- (c) To hire and discharge employees and to supervise their conduct and to fix their compensation;
- (d) To audit all receipts and disbursements of the Unit;
- (e) To conduct, manage, supervise and control all of the business of the Unit included in but not limited to, the conduct of tournaments, the selection of all dates and locations for holding such tournaments and the making of all contracts in connection therewith;"

Also significant is the fact that the ACBL disclaims any interest in property of the units. See Report of Tom Stoddard [Tr. p. 125]:

" . . . The important thing for the Unit to report is the worth of the Unit. * * * The League is not going to tax or assess any Unit or take any of this money; or in any way interfere with the Units. * * * Some Units have the impression that the League plans to do something to the Units. But nothing could be further from the truth."

The several units are thus individual members of a trade association bound together by the award system. This is a classic situation of a group boycott, and hence a *per se* violation.

The testing ground for the plaintiff's service of scoring duplicate bridge tournaments is the marketplace, such as performing its contract with the Riverside and Redlands units. Plaintiff's existence should be determined according to pricing, efficiency, service, and the judgment of satisfied customers such as the Riverside and Redlands units, and all in accordance with the free interplay of *market forces*. But the several hundred units of the ACBL, acting in accordance with the edict of the ACBL, have prevented these market forces from coming into play *at all*, by agreeing that the digital computer and paraphernalia such as provided by plaintiff cannot be used if awards are to be given.

Group Boycotts and the Law.

In *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 at page 212 the court stated:

"Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 466, 467-468, 61 S.Ct. 703, 707, 85 L.Ed. 949. Cf. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700. . . .

"Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character,' a 'monopolistic tendency.' As such it is not to be tolerated merely because the

victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations 'which "tend to create a monopoly,"' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.' *International Salt Co. v. United States*, 332 U.S. 392, 396, 68 S. Ct. 12, 15, 92 L. Ed. 20."

Monopoly in Its Broader Aspects.

In *Breier v. Northern California Bowling Proprietors' Assoc.*, 316 F. 2d 787, plaintiffs alleged that they were bowling operators in San Francisco. They sued some of their competitors and a national bowling proprietors' association alleging that the latter had violated the Sherman Act (Sections 1 and 15) by the following scheme and overt acts: Prices and rules were established for the bowling alleys that were members of the defendant association. Plaintiffs were not members and did not abide by the rules and prices. Defendant was alleged then to have *excluded customers of the non-member alleys from the tournaments organized by the defendant bowling association*. The analogy to our case seems complete. Two District Courts granted motions to dismiss the Complaint and appeals were taken. While the question of the right to amend forms a substantial portion of the opinion, the substantive issue became involved because the District Courts had ruled that since no cause of action was stated, no amendment should be

permitted. The Court of Appeals for the Ninth Circuit unanimously held in an opinion written by Circuit Judge Browning that the Complaint properly alleged the impact upon interstate commerce in equipment, appointments and furnishings used in the construction and maintenance of bowling establishments, in bowling pins and balls used in daily operations of these establishments, in balls, bags and shoes which they sell to bowlers and *upon an interstate network of tournaments organized and conducted by defendant*. (316 F. 2d at 790.) It is clear that these elements of the interstate commerce were not the acts in interstate commerce complained of and it is clear from the *Breier* case that there were two inquiries: (1) Is the defendant in interstate commerce, and (2) Has there been a combination and conspiracy to eliminate competition or an attempt to monopolize or a monopolization of trade and commerce or a restraint of trade and commerce, all as forbidden by the Sherman Act and as alleged in paragraphs 9, 10, 11 and 12 of the Second Amended Complaint here.

If *Breier* is any precedent at all, the District Court must be reversed.

Reasonableness.

It may be that the "danger" contemplated by the defendant ACBL is that by the aid of plaintiff's specialized digital computer and accompanying paraphernalia, the monumental task of match pointing, cumulating and ranking is done at a fraction of prior cost; that plaintiff has a competitive advantage as against manual scorers whom defendant ACBL controls and from whom defendant ACBL receives tribute. One cannot justify defendants' boycott on the grounds that it preserves the

status quo against the inroads of advancing technology. Those vigorous enough to employ the new tools of automation should be allowed free access to the marketplace.

In *American Federation of Tobacco Growers, Inc. v. Neal, et al.* (4 C.A. 1950), 183 F.2d 869, the trade association attempted to justify its refusal to admit plaintiff to membership on the grounds that the proposed member had a competitive advantage in not being subject to city taxes. The court had little difficulty holding that an actionable restraint of trade was involved.

At page 873, the court stated:

“As to the contention that the restraint of trade here involved was a reasonable one, it is a sufficient answer that the effect of the action of the defendants was to exclude a competitor from a substantial market in interstate commerce; and it is well settled that such exclusion is unreasonable per se. ‘The purpose of the anti-trust laws — an intentment to secure equality of opportunity — is thwarted if group-power is utilized to eliminate a competitor who is equipped to compete’. *William Goldman Theatres v. Loew’s, Inc.*, 3 Cir., 150 F. 2d 738, 743. ‘Not only is price fixing unreasonable, per se, * * * but also it is unreasonable, per se, to foreclose competitors from any substantial market.’ *International Salt Co. v. United States*, 332 U.S. 392, 396, 68 S.Ct. 12, 15, 92 L.Ed. 20; *Fashion Originators Guild v. Federal Trade Comm.*, 2 Cir., 114 F.2d 80, affirmed 312 U.S. 457, 61 S. Ct. 703, 85 L.Ed. 949. ‘The anti-trust laws are as much violated by the prevention of competition as by its destruction * * *. It follows a fortiori

that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 945, 92 L.Ed. 1236. See also *Fashion Originators Guild v. Federal Trade Comm.*, 312 U.S. 457, 668, 61 S.Ct. 703, 85 L.Ed. 949; *American Medical Ass'n v. United States*, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434."

Even if the trier of facts determines that the several hundred units of the ACBL are part and parcel of the defendant corporation (which they are not), then plaintiff should be allowed to show the monopolistic position of the defendants, the lack of legitimate business interest and the unreasonableness of their action in excluding plaintiff from the marketplace. One would think that unreasonableness is a question of fact for the jury. The Laws of Duplicate Contract Bridge, promulgated and published under the auspices of the American Contract Bridge League and referred to in the Second Amended Complaint at page 5, line 11 [Tr. p. 137], the following provisions are pertinent:

"95. SPONSORING ORGANIZATION

"Any organization [*i.e.*, the UNITS] may sponsor events or tournaments conducted under these Laws. The Sponsoring Organization has the following duties and powers:

"(a) to appoint the Tournament Director. If there is no nonplaying Tournament Director, the players should designate one of their own number to perform his functions."

"77. DUTIES OF OFFICIAL SCORER

"The Director is responsible for tabulating scores and records, but he may appoint one or more scoring assistants to perform these duties under his supervision.

"The duties of the Director or his scoring assistants include: preparing an Official Score, which sets forth each contestant's score for each board and his score and rank for the session and for the event; posting the Official Score, as promptly and as conspicuously as possible, for the inspection of the players; examining the scores recorded by the players; correcting scores that are patently incorrect, and returning for verification or correction scores that may be incorrect.

"78. PROCESS OF RECORDING SCORES

"At the conclusion of play on each board, the North player calculates the points scored, and records the score on the form provided for that purpose, including the following information:

"(a) the number of the board played, and the position and identifying number of each pair (or, in an individual contest, of each player);

"(b) the contract, indicating doubled or redoubled if applicable;

"(c) the declarer (North, South, East or West);

"(d) the points scored, and the side that scored them;

"(e) any other items required by the scoring form."

"81. TABULATION OF MATCH-POINTS
IN PAIR OR INDIVIDUAL PLAY

"Scores are tabulated in such manner that all scores made on the same board in the same direction (North-South or East-West) may be compared together. Considering only scores made by other pairs on the same board in the same direction, the Director awards to each score $\frac{1}{2}$ match-point for each other score identical with it, and 1 match-point for each lower score. When an adjusted score is awarded, each other contestant playing the same board in the same direction is awarded $\frac{1}{2}$ match-point for his comparison with the adjusted score."

"97. GENERAL RESPONSIBILITIES

"The Director is the official representative of the Sponsoring Organization. He is responsible for technical management of the tournament. He is bound by these Laws and by supplementary regulations announced by the Sponsoring Organization. His duties and powers including the following:

* * *

"(h) to collect scores and tabulate results.

"(i) to report results to the Sponsoring Organization for official record."

The plaintiff should be allowed to prove that *it complies* with each and every one of the Laws of Duplicate Contract Bridge as promulgated by the American Contract Bridge League. If so, the trier of facts might conclude that it would be unreasonable to exclude plaintiff from the marketplace.

Plaintiff should be entitled to show many, many facts bearing upon the unreasonableness of the action of the ACBL in excluding plaintiff from competition. Perhaps plaintiff can prove that the technical consultant for the ACBL itself first expressed interest and contacted plaintiff to inquire about its activities; that before the plaintiff's substantial investment was made, it was encouraged by the technical consultant of the ACBL and others connected with it to build and complete the machine; that a National Tournament director on the payroll of the ACBL consulted with and was paid by plaintiff in order to ensure compliance with the requirements of the ACBL; that defendant ACBL accepted advertising of plaintiff's services in a publication distributed throughout the eleven Western states, Alaska and Hawaii; that after plaintiff's computer was built and successfully tested, the defendant ACBL weakly protested that it would make inroads into the business of providing supplies and personnel for conducting duplicate bridge tournaments; and that the ACBL itself attempted to score duplicate bridge tournaments by computer methods, but failed due to the cost factor. After such evidence is adduced, one might well conclude that the exclusion of plaintiff from commerce under its unofficial rule is nothing more than a poorly veiled attempt to exclude competition until the defendant ACBL itself has perfected a computer to force on the several hundred "autonomous" units of the ACBL fix prices, exclude competition, and gain profits through monopolistic control.

Plaintiff is not insisting that the several hundred units contract with plaintiff. All plaintiff is insisting upon is its right to offer its goods and services to the

units, with the *possibility* of entering into contracts for scoring duplicate bridge tournaments. Whether these several hundred units contract with plaintiff or not is the business of the units and the plaintiff. But defendants should not interfere with the bargaining processes and the forces of a free market.

The Public Interest.

It is believed that this court must bear in mind the public interest that would be undermined should the decision of this District Court be affirmed. Plaintiff is able to provide the service of converting bridge points to master points, tabulating, cumulating them, and placing the competitors in the order of finish, all at a fraction of the cost as compared to present-day methods. The hundreds of thousands of competitors in duplicate bridge tournaments pay for these services, if not directly, then indirectly, by their card fees. Since the monumental task of manipulating this voluminous data can be handled less expensively by plaintiff, then the entrance fees charged to the players should be correspondingly reduced. Millions of dollars are spent by bridge players. See, for example, Charles Goren's article in McCall's Magazine for March, 1962, Volume 82, page 46. Affirming the District Court's judgment must necessarily take its toll on the captive bridge playing public.

The Cartwright Act.

The second count of the Second Amended Complaint sets forth a cause of action under the Cartwright Act. The Cartwright Act contemplates trade and commerce connected with the supply of services just as much as it

contemplates trade and commerce connected with physical goods. *Babcock v. Crafts 20 Big Shoes, Inc.*, 173 Cal. App. 2d 58, 342 P. 2d 974, involved the business of booking carnival-type events for use in conjunction with store openings, etc.

It is not seen where the Cartwright Act should be any more limited in scope than the antitrust laws of the United States. California courts have typically relied upon Federal cases (*Babcock, supra*), and the parallel to the Sherman Act is obvious. See cases cited by defendant [Tr. p. 168]: *Shasta Douglas Oil Co. v. Worth* (1963), 212 Cal. App. 2d 618, 624-625; *Associated Plumbing Contractors v. Spencer & Son, Inc.* (1963), 213 Cal. App. 2d 1. Whether contemplated or not at the time of the passage of the Cartwright Act, all intrastate commerce should come within its purview.

Interference With Prospective Economic Advantage.

The doctrine of *Temperton v. Russell*, 1 Q.B. 715 (1893), declared the principle that liability for interference with contracts extends to prospective or potential contracts. This rule has been followed in the United States and is Hornbook Law.

The Restatement of Torts sets forth the general rule in Section 766 as follows:

“... one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

“(a) perform a contract with another, or

“(b) enter into or continue a business relation with another

is liable to the other for the harm caused thereby.”

This section was quoted with approval in *Guillory v. Godfrey*, 134 Cal. App. 2d 628, 286 P. 2d 474, at page 477:

"... It is said that 'wrongful or malicious interference with the formation of a contract or the right to pursue a lawful business, calling, trade, or occupation has been generally held to constitute a tort, ***.' 86 C.J.S., Torts, §43, page 956. This rule prevails in California. *Finney v. Lockhart*, 35 Cal.2d 161, 217 P.2d 19; *Masoni v. Board of Trade of San Francisco*, 119 Cal.App.2d 738, 741-742, 260 P.2d 205; *Remillard-Dandini Co. v. Dandini*, 46 Cal.App.2d 678, 680, 116 P.2d 641; *California Grape Control Board v. California Produce Corp.*, 4 Cal.App.2d 242, 244, 40 P.2d 846; See, also, *Restatement of Torts*, §766, p. 49; 62 C.J. §53, p. 1137."

The court passed final judgment on this common law count *without so much as pointing out any defect in pleading*. If there is such a tort as interference with contractual relationships, the judgment must be reversed.

The Policy Regarding Motions to Dismiss.

The judgment of dismissal for lack of jurisdiction over the subject matter should not be sustained on the ground that the first cause of action fails to state a claim upon which relief can be granted. In *Corsican Productions v. Pitchess* (9 C.A. 1964), 338 F. 2d 441, Circuit Judge Browning stated, at page 442:

" '[T]he accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which

would entitle him to relief' (Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed. 2d 80 (1957)) '* * * precludes dismissal for insufficiency of the complaint except in the extraordinary case where the pleader makes allegations which show on the face of the complaint some *insuperable bar* to relief.' Wright, Federal Courts 250 (1963)." (Emphasis added.)

In *Bolick-Gillman Company v. Continental Baking Company* (9 C.A. 1960), 278 F. 2d 649, the court considered a private treble damage suit dismissed in the lower court on the basis of failure to state a claim. The court stated, at page 650:

"It cannot be said, however, that it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 1957, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L. Ed. 2d 80. Dismissal of the action upon this pleading was not warranted. See 2 Moore, Federal Practice, §1218 (2d Edition, 1948).

"Reversed and remanded with instructions that the order dismissing the complaint with prejudice be set aside and for further proceedings."

It hardly requires a citation of authorities to support the proposition that a motion to dismiss for failure to state a claim is unfavored, and that all doubts must be resolved in plaintiff's favor.

Conclusion.

It is submitted that the District Court usurped the province of the jury and decided factual issues without benefit of trial. It is submitted that there is clearly subject matter jurisdiction for the first cause of action whether this is a case of first impression or not. It is submitted that the proper testing ground for the plaintiff's business is the marketplace, and that, consistent with the historical policy of the law, defendants ought not interfere with the free play of market forces. It is submitted that the complaint states causes of action under the antitrust laws of the United States, the Cartwright Act, and under the common law regarding interference with prospective economic advantage. It is submitted that the issues of group boycott, reasonableness and the like should be decided by a trial on the merits, and that plaintiff should have its day in court.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRED FLAM,

No. 20756

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRIDGE CORPORATION OF AMERICA,

Appellant,

vs.

THE AMERICAN CONTRACT BRIDGE LEAGUE, INC., *et al.*,

Appellees.

BRIEF FOR APPELLEES.

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No. 20756

In the

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRIDGE CORPORATION OF AMERICA.

Appellant.

vs.

THE AMERICAN CONTRACT BRIDGE LEAGUE, INC., *et al.*,

Appellees.

BRIEF FOR APPELLEES.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, Central Division, entered on January 3, 1966 dismissing all three causes of action of plaintiff's Second Amended Complaint. The First Cause of Action was dismissed for lack of jurisdiction over the subject matter; the Second and Third Causes of Action for failure to state a claim upon which relief can be granted [Judgment, C.T. 175, App. C.]*

*References in this brief to pleadings and other documents included in the Clerk's Transcript will identify the particular document and cite the transcript page, e.g. "Complaint, C.T. ____". The Reporter's Transcript of the hearing on the motion to dismiss plaintiff's Second Amended Complaint will be cited "R.T. ____". For convenience, certain portions of the Clerk's Transcript have been set out as appendices to this brief. These include: Appendix A — Memorandum Opinion filed 12/21/64; Appendix B — Memorandum Opinion filed 12/16/65; Appendix C — Judgment entered 1/3/66. References to Appellant's Opening Brief are cited as "Brief, p. ____".

The Second Amended Complaint was filed on March 5, 1965, and contained three alleged causes of action. The First Cause of Action was against the American Contract Bridge League, Inc. (hereinafter referred to as the "League"), and certain officers of the League; jurisdiction was allegedly based upon Sections 1, 2 and 15 of Title 15 of the United States Code (Sections 1 and 2 of the Sherman Act, and Section 4 of the Clayton Act). The Second and Third Causes of Action were against only the League and one of its officers, with jurisdiction purportedly based upon diversity of citizenship (28 U.S.C. § 1332.)

On October 29, 1965 defendants filed a Notice of Motion and Motion to Dismiss all three causes of action of plaintiff's Second Amended Complaint, and accompanied the motion with a memorandum of points and authorities. Plaintiff filed a memorandum of points and authorities in opposition to the motion to dismiss and the matter came on for hearing on November 29, 1965 before the Honorable Jesse W. Curtis. By Memorandum Opinion dated December 16, 1965 the Court granted the motion to dismiss the First and Second Causes of Action on the grounds that "the conduct complained of does not constitute the kind of 'trade or commerce' contemplated by the Sherman Act" or "by the Cartwright Act," and as to the Third Cause of Action on the ground that the alleged "restriction as to the recording of master points is reasonable and logical under the circumstances, and is permissible." [Opinion, C.T. 173-74, App. B.]

Jurisdiction of this Court is based upon 28 U.S.C. § 1291.

Counter-Statement of the Case.

Plaintiff is a California corporation which developed a digital computer designed to compute and record the match points scored by bridge players at duplicate bridge tournaments. [Complaint, C.T. 133.]¹

The League is a non-profit corporation organized under the membership corporation laws of the State of New York for the purpose of promoting the playing of bridge throughout the United States and Canada. [Opinion, C.T. 128, App. A; Complaint, C.T. 135.] It is the corporate combination of several hundred membership associations called "units" which conduct bridge tournaments in particular areas designated by the League. [Opinion, C.T. 128, App. A; Complaint, C.T. 134.] The League operates a merit-ranking system for bridge players; as an integral part of this system it awards bridge players so-called "master points" based upon playing performance at bridge tournaments. [Complaint, C.T. 135; Opinion, C.T. 129, App. A.] The League also conducts and sponsors certain duplicate bridge tournaments, and computes and records the scores of players at these bridge tournaments. [Complaint, C.T. 137.]

During August of 1963 plaintiff obtained the approval of certain tournament officials to use plaintiff's computer to score a bridge tournament to be conducted by the Riverside and Redlands units of the League. No contract was entered into, but plaintiff had a reasonable probability that its computer would be so used. [Complaint, C.T. 148-49.] However, Alvin Landy, the League's executive secretary, notified the directors and

¹Unless otherwise indicated, references to "Complaint" refer to the Second Amended Complaint.

managers of the tournament that if the units used the computer to score the bridge tournament, the League would not award any of its master points to the players participating in the tournament. As a result, the tournament managers and directors declined to use the computer to score the bridge tournament. [Complaint, C.T. 149.] Because these acts of the League became known to other tournament officials, plaintiff was unable to use its computer to score other tournaments. [Complaint, C.T. 150.] Plaintiff thus claims it has lost the value of the investment in the computer, plus the profits that would have been expected from scoring these bridge tournaments. [Complaint, C.T. 150.]

Prior Proceedings.

The original complaint in this action was filed on or about July 7, 1964. Defendants moved to dismiss this complaint for lack of subject matter jurisdiction over the causes of action based upon the Sherman Act, and for failure to state a claim upon which relief could be granted for the remaining causes of action. However, prior to the hearing on the motion to dismiss, plaintiff filed a First Amended Complaint. [C.T. 4.]

Defendants again moved to dismiss all causes of action of the First Amended Complaint on the grounds that the court lacked subject matter jurisdiction to consider the causes of action based upon the Sherman Act, and that the remaining causes of action based upon diversity failed to state a claim upon which relief could be granted. [Motion, C.T. 47-49.] Defendants filed a

memorandum of points and authorities in support of the motion to dismiss, and in further support of the motion to dismiss for lack of subject matter jurisdiction submitted various exhibits setting out various aspects of the League's activities. [Exs., C.T. 85-101.] Plaintiff then filed a memorandum in opposition to this motion to dismiss, and accompanied this memorandum with affidavits and exhibits. [Exs., C.T. 118-127.] (See Appellant's Opening Brief for numerous references to these exhibits.) The motion to dismiss came on for hearing before the Honorable Jesse W. Carter, and by Memorandum Opinion dated December 21, 1964 the Court dismissed the causes of action based upon the Sherman Act on the ground that even if some monopolistic effects or a restraint of trade may result from the activities alleged, the scoring of bridge tournaments is "not the kind of 'trade or commerce' that Congress had in mind in enacting the Sherman Act." The remaining counts were dismissed for failure to properly allege diversity of citizenship. [Opinion, C.T. 128, 130; App. A.] Plaintiff was granted leave to file an amended complaint.

A Second Amended Complaint was thereafter filed, but the complained of activities were the same as alleged in the First Amended Complaint. [See analysis at C.T. 161-165; Opinion, C.T. 173-174, App. B.] As pointed out above, the judgment of dismissal of this Second Amended Complaint forms the basis for this appeal.

Statutes Involved.

Plaintiff attempts to establish jurisdiction for the First Cause of Action of the Second Amended Complaint under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 and under Section 4 of the Clayton Act, 15 U.S.C. § 15.

Section 1 of the Sherman Act provides that :

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal; * * *.”

Section 2 of the Sherman Act provides that :

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *.”

Section 4 of the Clayton Act provides that :

“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

Plaintiff’s Second Cause of Action of the Second Amended Complaint is based upon diversity of citizenship jurisdiction, and attempts to state a claim under the California Cartwright Act, Sections 16,700 through 16,758 of the California Business & Professions Code. Section 16,720 is the basic section of the Cartwright Act; this section is set out in full as Appendix D to this brief.

Questions Presented.

1. Whether the calculating and recording of points scored by bridge players at duplicate bridge tournaments is the type of trade or commerce encompassed within the meaning of the Sherman Act.

2. Whether such calculating and recording of bridge scores is the type of trade or commerce encompassed within the meaning of the California Cartwright Act.

3. Whether the activities of the League in limiting the type of scoring devices utilized by its units to score bridge tournaments where the League is to award its master points, are so unreasonable and unprivileged that they constitute an unlawful interference with prospective business relationships.

Summary of Argument.

In determining whether there is the requisite trade or commerce to support jurisdiction under the Sherman Act it is well established that only the activities complained of as violating that Act can be considered. The lower court correctly applied this principle and limited the scope of inquiry to whether the calculating and recording of the points scored by bridge players at bridge tournaments is the type of trade or commerce contemplated by Congress in enacting the Sherman Act.

The United States Supreme Court in the leading case of *Apex Hosiery Co. v. Leader* (1943), 310 U.S. 469, 84 L. Ed. 1311, restricted the application of the Sherman Act to unreasonable restraints on commercial competition. In a later decision the Supreme Court reaffirmed the validity of *Apex*, and stated that the Act is aimed primarily at combinations having commercial ob-

jectives and is applied only to a very limited extent to the activities of organizations which have other objectives.

These cases, plus other federal cases, clearly support the lower court's conclusion that the calculating and recording of bridge scores is not the type of commercial activity encompassed within the Sherman Act. An examination of the mechanics of such scoring shows clearly that this is the simplest sort of non-commercial activity, very much like the scoring of track meets, tennis matches, chess tournaments or other games. The Sherman Act has not been, and should not be extended to apply to this type of non-commercial activities. Thus, the lower court properly held there was no trade or commerce to support Sherman Act jurisdiction over plaintiff's First Cause of Action, and properly dismissed this cause of action.

The calculating and recording of bridge scores is not trade or commerce within the meaning of the California antitrust laws for the same reason it is not trade or commerce within the meaning of the Sherman Act. California cases clearly recognize exceptions to the Sherman Act created by federal decisions, and have applied these same exceptions to cases brought under the Cartwright Act. Furthermore, the very terms of the California Act show the Act is restricted to normal commercial activities. Therefore, although the lower court may have diversity jurisdiction over plaintiff's Second Cause of Action, it properly held that this cause of action did not state a claim upon which relief can be granted.

Because of the reasonableness of the League's actions in limiting the type of scoring devices used by its units in tournaments where master points are to be awarded, the actions do not amount to an unlawful interference with business relationships. Furthermore, California law clearly recognizes that the activities complained of by plaintiff are protected by a privilege. The activities were necessary and reasonable because of the confidential relationship between the League and its units, and because the League was merely controlling its master point system by restricting the type of scoring devices to be utilized at tournaments where master points are to be awarded. Since the basis of the privilege is revealed by the allegations of the complaint, the District Court properly dismissed the Third Cause of Action for failure to state a claim on which relief can be granted.

ARGUMENT.

I.

In Determining Whether There Is the Requisite Trade or Commerce to Support Jurisdiction Under the Sherman Act, Only the Acts Complained of as Violative of the Act Are to Be Considered.

The lower court in concluding that the scoring of games of duplicate bridge at bridge tournaments was not the type of trade or commerce encompassed by the Sherman Act, correctly applied the principle that only the activities complained of by a treble damage plaintiff are relevant in determining the jurisdictional basis necessary to support the action. This principle has been well established in this Circuit and in other Circuits; its application is necessary to limit the scope of inquiry in determining whether the court has jurisdiction over the subject matter of an action brought under the Sherman Act.

This rule has been set out in a number of cases considering the question of whether the complained-of activities were in interstate or foreign commerce; naturally the same rules would be applicable in determining the even more basic question of whether the complained-of activities are "trade or commerce" within the meaning of the Sherman Act.

A recent Ninth Circuit case sets out these requirements. In *Page v. Work* (9th Cir. 1961), 290 F. 2d 323, cert. denied 368 U.S. 875, the Court affirmed the dismissal of a private antitrust action since the necessary effect on interstate commerce was missing. In *Page v. Work* both the plaintiff and defendant were engaged in interstate commerce, *but this fact was considered im-*

material since the complained-of activities had no effect on interstate commerce.

“* * * The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the *conduct complained of affects the interstate commerce of such business.*” (290 F. 2d at 330.) (Emphasis added.)

Another recent case also sets out the rules for determining whether a Court has jurisdiction to consider an antitrust action. In *Lieberthal v. North Country Lanes, Inc.* (2d Cir. 1964), 332 F. 2d 269, the Court in dismissing a private treble damage action set out the requisite restraint on interstate commerce necessary for a violation of Sections 1 or 2 of the Sherman Act.

“To establish a violation of either Section 1 or Section 2 of the Sherman Antitrust Act Lieberthal was required to allege facts showing that the conspiracy had an impact on *interstate* commerce either because the acts complained of occurred in interstate commerce or because those acts, though occurring wholly on the local level, substantially affected interstate commerce. * * *

(332 F. 2d at 270.)

The Court clearly pointed out that it is not enough to show that the defendant is engaged in interstate commerce in some aspects of its business—it must be shown that the *complained-of activities* affect interstate commerce.

“It may be that defendants, as owners of national bowling alley chains, are interstate businesses. But ‘the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained

of affects the interstate commerce of such business.' *Page v. Work*, supra at 330 of 290 F. 2d. Accord, *United States v. Yellow Cab Co.*, supra (carriage by defendant of passengers from one train station to another as in interstate commerce but other taxi transportation to and from stations is intrastate commerce). Lieberthal does not allege any restraint of the national activities in which defendants are engaged; he complains only of an agreement affecting their intrastate operations." (332 F. 2d at 272.)

Other cases holding that the plaintiff failed to demonstrate that the complained-of acts had the necessary effect on interstate commerce in order to bring an action under the antitrust laws are:

Best Advertising Corp. v. Illinois Bell Tel. Co.
(7th Cir. 1965), 339 F. 2d 1009;

Gordon v. Illinois Bell Tel. Co. (7th Cir. 1964),
330 F. 2d 103, 106-07;

Elizabeth Hospital, Inc. v. Richardson (8th Cir.
1959), 269 F. 2d 167, 170-71, cert. denied 361
U.S. 884;

Riggall v. Washington County Medical Society
(8th Cir. 1957), 249 F. 2d 266, cert. denied
355 U.S. 954;

Spears Free Clinic v. Cleere (10th Cir. 1952),
197 F. 2d 125.

It should be noted that the *Page v. Work* and *Lieberthal* cases are, and were, cited by defendants only in support of the rule that only the complained-of activities can be considered in determining subject matter jurisdiction; and that, therefore, the numerous allegations

concerning activities of the League that are in no way connected with the acts that gave rise to plaintiff's damage must be disregarded. Defendants, contrary to plaintiff's understanding (Brief pp. 15-16), make no claim that these cases are or are not factually similar to the present case. But defendants do claim these cases clearly establish the rule that only the complained of activities are relevant in determining Sherman Act jurisdiction.

In the present case the complained-of activities are simply those set out above—the League told its units that if plaintiff's computer were to be used to score a bridge tournament conducted by the units, then the League would not award its master points to the players competing in the tournament. Thus, the basic question for subject matter jurisdiction is whether the calculating and recording the scores of duplicate bridge players is the type of trade or commerce contemplated by Congress in enacting the Sherman Act.

II.

The Calculating and Recording of the Scores of Players at Duplicate Bridge Tournaments Is Not the Type of Commercial Activity Encompassed by the Sherman Act.

A. The Supreme Court Has Restricted the Application of the Sherman Act to Unreasonable Restraints on Commercial Activities.

Sections 1 and 2 of the Sherman Act proscribe certain unreasonable restraints on, or monopolization of, "trade or commerce among the several states, or with foreign nations." The United States Supreme Court has specifically refused to apply the Sherman Act to all restraints of any kind on interstate trade or commerce; it has instead restricted the Act to certain types of un-

reasonable restraints on "commercial competition." The basic rule of restrictive application of the Sherman Act was set out in the leading case of *Apex Hosiery Co. v. Leader* (1943), 310 U.S. 469, 84 L. Ed. 1311, as follows:

"It was another and quite a different evil at which the Sherman Act was aimed. It was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

"For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes. *Atlantic Cleaners & Dyers v. United States*, 286 US 427, 434, 76 L. ed 1204, 1208, 52 S. Ct 607, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected inter-

state commerce. Because many forms of restraint upon commercial competition extended across state lines so as to make regulation by state action difficult or impossible, Congress enacted the Sherman Act, 21 Cong. Rec. 2456. *It was in this sense of preventing restraints on commercial competition that Congress exercised 'all the power it possessed.'* *Atlantic Cleaners & Dyers v. United States*, supra (286 US 435, 76 L. ed 1208, 52 S. Ct 607)." (310 U.S. at 492-495, 84 L. Ed. at 1323-1324; emphasis added.)

Although later Supreme Court decisions further developed the labor union "immunity" from Sherman Act prosecutions in terms of the statutory exceptions,² the limiting doctrine of *Apex* has been restated and applied in later cases. For example, the Supreme Court in the leading case of *Klor's v. Broadway-Hale Stores, Inc.* (1959), 359 U.S. 207, 3 L. Ed. 2d 741, reaffirmed the validity of *Apex* and its recognition that the activities of certain non-commercial organizations are outside the scope of the Sherman Act. The Court stated:

"The court below relied heavily on *Apex Hosiery Co. v. Leader*, 310 US 469, 84 L. ed 1311, 60 S. Ct 982, 128 ALR 1044, in reaching its conclusion. While some language in that case can be read as supporting the position that no restraint on trade is prohibited by §1 of the Sherman Act unless it has or is intended to have an effect on market prices, such statements must be considered in the

²The leading case is *United States v. Hutcheson* (1941), 312 U.S. 219, where the Court interlarded Sections 6 and 20 of the Clayton Act, and the Norris-LaGuardia Act, to immunize peaceful union picketing and boycotts from Sherman Act prosecution.

light of the fact that the defendant in that case was a labor union. *The Court in Apex recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives.*" (Emphasis added; 359 U.S. at 213, n. 7, 3 L. Ed. 2d at 745, n. 7.)

Other Supreme Court and lower federal court cases have similarly restricted the application of the Sherman Act even though the activities involved were anti-competitive.

See:

United Mine Workers v. Pennington (1965), 381 U.S. 657, 670, 14 L. Ed. 2d 626, 636 (concerted efforts to influence public officials do not violate the Sherman Act even though intended to eliminate competition);

Eastern R.R. Conference v. Noerr Motor Freight (1961), 365 U.S. 127, 5 L. Ed. 2d 464 (same holding as in *Pennington*);

United States v. Boston & Maine R.R. (1965), 380 U.S. 157, 162, 13 L. Ed. 2d 728, 732 (bribery not within scope of antitrust laws);

Kennedy v. Long Island Rail Road Company (2nd Cir. 1963), 319 F. 2d 366, 372-373 (strike insurance plan of a group of railroads not within the scope of the Sherman Act);

Sterling Nelson & Sons, Inc. v. Rangen, Inc. (D. Ida. 1964), 235 F. Supp. 393, 399-400, aff'd (9th Cir. 1965), 351 F. 2d 851 (commercial bribery not under the scope of the Sherman Act).

It is therefore clear that there is a judicially created exception to the Sherman Act for certain non-commercial activities. The lower court in this case clearly recognized this exception, and properly applied it to the activities complained of by the plaintiff.

B. The Calculating and Recording of the Points Scored by the Players at Duplicate Bridge Tournaments Is Not the Type of Commercial Activity That Is Encompassed by the Sherman Act.

The two opinions of the District Court, and the judgment dismissing the Second Amended Complaint, rest on one simple premise. This premise is not, as alleged by plaintiff (Brief p. 13), that "services" as such are or are not exempt from the Sherman Act. The premise is not, as alleged by plaintiff (Brief p. 13), that activities such as the "business of producing, booking and presenting legitimate attractions on a multi-state basis"³ are or are not interstate trade or commerce within the meaning of the Sherman Act. The premise is not, as alleged by plaintiff (Brief pp. 15-17), that the alleged restraints were only local in nature and hence there was no interstate trade or commerce. The premise is not, as alleged by plaintiff (Brief pp. 17-19), that the League is or is not a trade association. The premise is not, as alleged by plaintiff (Brief pp. 22-23), that any boycott would be justified by any alleged competence or lack of it of plaintiff. The premise is simply that the calculating and recording of the scores of bridge players at duplicate bridge tournaments is not the type of trade or commerce encompassed by the Sherman Act.

Plaintiff has failed to point to any authorities to demonstrate that the prohibitions of the Sherman Act apply

³*United States v. Shubert* (1955), 348 U.S. 222, 226, 99 L.Ed. 279, 284.

to the scoring of bridge games played at tournaments. The primary reliance of plaintiff on the case of *Breier v. Northern California Bowling Proprietors Assn.* (9th Cir. 1965), 316 F. 2d 787 (Brief p. 21), is completely misplaced. First, the case involved a boycott directed at certain bowling alleys. Certainly the commercial aspects of the operation of bowling alleys are far different from that of simply the calculating and recording of bridge scores. Second, and even more important, the court in that case specifically refused to rule whether or not the complained-of activities amounted to interstate commerce sufficient to sustain Sherman Act jurisdiction. The court stated explicitly:

"We do not decide whether the allegations of the present complaints charged a violation of the Sherman Act. The problems which would be presented on the present allegations may not arise on amended complaints. * * *

"We also decline to speculate as to whether the amended complaints will be legally sufficient. It has been said that the sufficiency of an amended pleading ordinarily will not be considered on motion for leave to amend (cite omitted); and in any event it is inappropriate for an appellate court to evaluate possible amendments not yet considered by the court below." (316 F. 2d at p. 790.)⁴

⁴The case involved solely the right of plaintiff to amend a complaint:

"We think appellants were entitled to file amended complaints as a matter of right. 'A party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *.' Rule 15(a), Fed. R.Civ.P. A motion to dismiss is not a 'responsive pleading' within the meaning of the Rule. Neither the filing nor granting of such a motion before answer terminates the right to amend; an order of

That the scoring of bridge tournaments is not trade or commerce in the commercial sense is easily demonstrated by a simple reference to the "Laws of Duplicate Contract Bridge" as set out on pages 24 through 26 of plaintiff's brief. Certainly the activities described by these rules are a far cry from the type of commercial competition referred to in the *Apex* case as necessary to support Sherman Act jurisdiction. In fact, plaintiff concedes that the scoring of national bridge tournaments is not unlawful under the Sherman Act. (Brief p. 8.) Certainly the scoring of track meets, tennis matches, swimming meets, chess tournaments, or similar games and sports, could not reasonably be contended to be the type of trade or commerce contemplated by Congress in enacting the Sherman Act. And yet, this is exactly the type of activity involved in the present case.

Thus, the lower court correctly applied the governing principles enunciated by the Supreme Court to the facts at hand, and quite properly concluded that the calculating and recording the scores of bridge players at duplicate bridge tournaments is not "trade or commerce" within the meaning of the Sherman Act. [Opinions, C.T. 128, 173, Apps. A, B.] Without the requisite trade or commerce the lower court lacked subject matter jurisdiction over the First Cause of Action of plaintiff's Second Amended Complaint; therefore, the dismissal of this cause of action was entirely proper and should be affirmed by this Court.

dismissal denying leave to amend at that stage is improper, and a motion for leave to amend (though unnecessary) must be granted if filed." (316 F.2d at p. 789.)

This latter point is not involved in the present case for plaintiff has not specified failure to grant leave to amend as an error [Statement, C.T. 182], and, of course, it could not do so because at the hearing on the motion to dismiss, the plaintiff's attorney stated that he had alleged the best case that the plaintiff had. [R.T. 49-50.]

III.

The Scoring of Duplicate Bridge Tournaments Is Not Trade or Commerce Within the Meaning of the California Antitrust Act for the Same Reasons It Is Not Trade or Commerce Within the Meaning of the Sherman Act.

Plaintiff's Second Cause of Action purports to be based upon diversity of citizenship jurisdiction and is directed only against the League and Alvin Landy, the Executive Secretary of the League. By incorporation by reference plaintiff makes the same allegations in the Second Cause of Action as in the First Cause of Action, except that the activities have allegedly violated certain provisions of the California antitrust law (commonly known as the Cartwright Act) rather than the Sherman Act. The allegations contained in the Second Cause of Action fail to state a claim against defendants upon which relief can be granted for precisely the same reasons that the Court lacks jurisdiction over the First Cause of Action. That is, the activities described are not "trade or commerce" within the meaning of the Cartwright Act, nor of the Sherman Act.

Initially, it should be noted that Federal decisions under the Sherman Act are authoritative in cases under the Cartwright Act.

Shasta Douglas Oil Co. v. Worth (1963), 212 Cal. App. 2d 618, 624-625, 28 Cal. Rptr. 190;
Associated Plumbing Contractors v. Spencer & Son, Inc. (1963), 213 Cal. App. 2d 1, 28 Cal. Rptr. 425.

Thus, the judicially created exception to the Sherman Act for non-commercial activities would undoubtedly be recognized by California courts.

See:

Osteopathic Physicians & Surgeons v. Calif. Medical Assoc. (1964), 224 Cal. App. 2d 378, 396, 398; Cal. Rptr. 641 (Cartwright Act does not apply to restraints on practice of medicine, nor to agreements to sponsor legislation.)

It should further be noted that the California Cartwright Act (Sections 16700 through 16758 of the California Business and Professions Code) by its own terms applies only to commercial ventures, not to non-commercial activities such as the scoring of bridge tournaments. In this regard, see especially Section 16720 (App. D) and its references to "trade or commerce", "the price of merchandise or of any commodity", "manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity", and so forth. Under both the Sherman and Cartwright Acts the complained-of activities must be "trade or commerce."

Thus, if the activities of the League in connection with the calculating and recording of the scores of players at bridge tournaments are not trade or commerce within the meaning of the Sherman Act, they are certainly not trade or commerce within the purview of the California antitrust laws. The exclusion from the purview of the Sherman Act is not based upon the lack of *interstate* trade or commerce—it is based upon the more fundamental point that there is lacking even the type of trade or commerce itself that is contemplated by the Sherman Act. Thus, the intrastate nature of defendants' activities does not in any way make these activities subject to the Cartwright Act since there is still lacking the necessary trade or commerce to state a claim under this Act.

So, although the District Court may have subject matter jurisdiction over the Second Cause of Action based upon diversity of citizenship, the Second Cause of Action still fails to state a claim upon which relief can be granted under the Cartwright Act because the Cartwright Act does not apply when there is no trade or commerce within the meaning of that Act. The dismissal by the lower court of the Second Cause of Action was correct and proper in all respects, and should be affirmed.

IV.

The Alleged Activities of the League Are Not an Unlawful Interference With Prospective Business Relationships Because It Is Reasonable and Privileged for the League to Control the Scoring Devices Utilized by Its Units in Tournaments Where the League Is to Award Master Points.

Plaintiff's Third Cause of Action of the Second Amended Complaint is against only the League and Alvin Landy, and is based upon diversity of citizenship jurisdiction. Plaintiff in this cause of action alleges the same facts as in the other causes of action—*i.e.*, that the League and Landy advised the Riverside and Redlands units of the League that if plaintiff's scoring device was utilized in bridge tournaments conducted by these units, then the match points normally awarded by the League would not be recorded nor scored. [Complaint, C.T. 148-150.] Since plaintiff did not have an existing contract with these units, it simply alleges that this conduct of the League amounted to unlawful interference with the prospective business relationship of the plaintiff. [Complaint, C.T. 149.]

This conduct is, of course, precisely the same conduct that the lower court held did not violate the Sherman Act because the requisite "trade or commerce" was missing. However, the Court in both opinions also held that the restrictions on the awarding the League's master points were a reasonable and logical method of carrying out the basic purposes of the League. The Court stated:

"Any league or association must have rules and regulations in order to survive, and since its membership is entirely voluntary, it can impose almost any condition upon its membership which it wishes so long as these conditions are not unlawful and have some reasonable relation to the purpose of the league. *Molinas v. National Basketball Ass'n.*, 190 F. Supp. 241 (S.D.N.Y. 1961). Since the very basis of the League's appeal to its membership is the Master Point plan, it seems only reasonable and logical that the League should seek to control the mechanics of scoring. And since it is the one which awards the Master Points, it can give or withhold these Master Points upon whatever conditions it may determine." [C.T. 130, App. A.]⁵

The Court adhered to this holding in the second Opinion. [Opinion, C.T. 174, App. B.] Accordingly, there was no *unlawful* interference with prospective business relationships, and the Third Cause of Action was dismissed for failure to state a claim upon which relief could be granted. [Judgment, C.T. 175, App. C.]

⁵In a recent case this Court held that similar rules of the Professional Golfers Association were reasonable and logical, and therefore exclusion of the plaintiff from participating in PGA tournaments on the basis of failure to comply with these rules was not unlawful. *Deesen v. The Professional Golfer's Assn.*, (9th Cir. 1966), 1966 Trade Cases ¶ 71,706.

This ruling of the lower court is entirely logical, and comports fully with California authorities regarding the tort of interference with prospective business relationships. Logically, if the conduct of the League is reasonable and proper to protect legitimate interests of the League, it would be anomalous to hold that such conduct is in fact tortious.

Legally, the holding of the lower court is fully in accord with California authorities which hold that there is no cause of action based upon an alleged interference with prospective business advantage when the conduct complained of falls within a privilege.

The general principles governing actions for inducing breach of prospective business advantage are set out in the case of *Lawless v. Brotherhood of Painters* (1956), 143 Cal. App. 2d 474, 477-478 as follows:

"It is true that an action will lie for unjustifiably inducing a breach of contract by a party thereto. [Citations omitted.] However, the inducement must be wrongful and unprivileged. One who is in a confidential relationship with a party to a contract is privileged to induce the breach of that contract." (143 Cal. App. 2d at 477 and 478.)

Another base of privilege was:

"If two parties have separate contracts with a third, each may resort to any legitimate means at his disposal to secure performance of his contract even though the necessary result will be to cause a breach of the other contract." (143 Cal. App. 2d at 478.)

Under the first basis of privilege set out in the *Lawless* case, the activities of the League were privileged

because of the confidential relationship between the League and its own units, and especially the relationship between the League and the units when the units are conducting bridge tournaments where the League's master points are to be awarded.

Furthermore, by analogy to the second ground of privilege set out in the *Lawless* case, the activities of the League are privileged because the League was simply requiring the units to adhere to the scoring policies set out by the League when the tournament is to award the League's master points.

Other authorities holding to the same effect are :

Show Management v. Hearst Publishing Co.
(1961), 196 Cal. App. 2d 606, 618-619; 16
Cal. Rptr. 731;

Wise v. Southern Pacific Co. (1963), 223 Cal.
App. 2d 50, 72-73; 35 Cal. Rptr. 652;

Sullivan v. Warner Bros. Theatres, Inc. (1941),
42 Cal. App. 2d 660, 662; 109 P. 2d 760;

Restatement, Torts, § 769.

Finally, it is clear that the California courts do not require a trial on the merits to sustain the dismissal of an action when the defense is based upon a privilege. In both *Show Management v. Hearst Publishing Co.*, *supra*, and *Wise v. Southern Pacific Co.*, *supra*, the appellate courts affirmed the sustaining of demurrers to the complaint (or to certain causes of action of the complaints) when, as here, the applicable privilege is revealed by allegations in the complaint.

Since the activities of the League are reasonable and protected by privilege, plaintiff's Third Cause of Action fails to state a claim upon which relief can be granted. The judgment of the lower court in dismissing this cause of action should be affirmed.

Conclusion.

For the foregoing reasons the judgment of the District Court should be affirmed in all respects.

Dated: May 23, 1966.

Respectfully submitted,

JULIAN O. VON KALINOWSKI.

PAUL G. BOWER.

GIBSON, DUNN & CRUTCHER.

Attorneys for Appellees.

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

PAUL G. BOWER

APPENDIX A.

Memorandum Opinion.

United States District Court, Southern District of California, Central Division.

Bridge Corporation of America, a corporation, Plaintiffs, vs. The American Contract Bridge League, Inc., etc., et al., Defendants. No. 64-897-JWC.

Filed: December 21, 1964.

This matter comes before the court upon defendants' motion to dismiss all seven causes of action set forth in plaintiff's first amended complaint.

The defendant, The American Contract Bridge League, Inc., hereinafter called the League, the principal defendant herein, is a non-profit corporation organized under the membership corporation laws of the State of New York for the purpose of promoting the playing of bridge throughout the United States and Canada. The other defendants are officers and directors of the League and are themselves engaged in carrying out its purposes. The League is the corporate combination of several hundred membership associations, or corporations, which plaintiff calls units, which are chartered by the League and are thereby given the exclusive right to conduct duplicate bridge tournaments in their particular areas. As a part of the scheme, the League operates a Master Point plan under which all players are scored, rated and their scores recorded. It also furnishes supplies and personnel to assist the units in conducting their tournaments.

The plaintiff has been incorporated for the express purpose of supplying personnel and equipment for the direction and scoring of duplicate bridge tournaments. In doing so, it uses a digital computer which it has designed and built and which it alleges performs the func-

tion of scoring much faster, more accurately, and less costly than the defendants' human score computers.

Plaintiff has demonstrated his computer, and some units have contracted for its use. However, the League has refused to allow any of its units to use plaintiff's computers and has compelled units which have already agreed to use it to breach their contracts with plaintiff, under threat that no Master Plan Points so computed will be recognized and recorded. It is this conduct which plaintiff contends is monopolistic and an unlawful restraint of trade within the proscription of the Sherman Act.

In moving to dismiss counts one and two of the amended complaint, the defendants contend that they are engaged in the promotion of the game of contract bridge and that bridge is not "trade or commerce" within the meaning of the Sherman Act. At the time of the hearing plaintiff made it clear that it was making no contention that the promotion of bridge tournaments, as such, is or is not "trade or commerce" within the meaning of the Sherman Act. But it does contend that the *furnishing of personnel* for the purpose of scoring tournaments is "trade or commerce".

This appears to be a case of first impression as no authorities have been cited and none have been found which bear directly upon the issue.

Any league or association must have rules and regulations in order to survive, and since its membership is entirely voluntary, it can impose almost any condition upon its membership which it wishes so long as these conditions are not unlawful and have some reasonable relation to the purpose of the league. *Molinas v. National Basketball Ass'n.*, 190 F. Supp. 241 (S.D.N.Y. 1961). Since the very basis of the League's appeal to its mem-

bership is the Master Point plan, it seems only reasonable and logical that the League should seek to control the mechanics of scoring. And since it is the one which awards the Master Points, it can give or withhold these Master Points upon whatever conditions it may determine. If some monopolistic effects follow or any restraint of trade results, this is still not the kind of "trade or commerce" that Congress had in mind in enacting the Sherman Act.

As to counts three through seven, the defendants have moved to dismiss upon the grounds "that it appears on the face of the first amended complaint that the jurisdiction of this court for these causes of action depends upon diversity of citizenship and that such diversity is not shown by the complaint because it is either alleged in the complaint that plaintiff Bridge Corporation of America and defendant American Contract Bridge League, Inc. are citizens of the same state or the complaint does not allege the citizenship of the defendant American Contract Bridge League, Inc. in that the complaint fails to allege in which state said League has its principal place of business." This contention is valid. *Stenhouse v. Jacobson*, 193 F. Supp. 694 (N.D. Calif. 1961); *Brandt v. Bay City Super Market*, 182 F. Supp. 937 (N.D. Calif. 1960).

In view of the foregoing discussion, it is unnecessary to discuss the other contentions urged by the defendants.

Plaintiff's first amended complaint will, therefore, be dismissed as to all counts and plaintiff shall have thirty days within which to amend.

Dated this 21st day of December, 1964.

/s/ Jesse W. Curtis

United States District Judge

APPENDIX B.

Memorandum Opinion.

United States District Court, Southern District of California, Central Division.

Bridge Corporation of America, Plaintiff, v. The American Contract Bridge League, Inc., etc., et al., Defendants. No. 64-897-JWC.

Filed December 16, 1965.

This is the second time this matter has come to the attention of this court on a motion to dismiss plaintiff's complaint. The second amended complaint, now under consideration, consists of three alleged causes of action. The first of which is based on certain alleged violations of Sections 1 and 2 of the Sherman Act. The second is based on diversity of citizenship and alleges certain violations of the Cartwright Act. The third is also based on diversity of citizenship and alleges an interference with the prospective business advantage of the plaintiff.

In ruling on defendant's earlier motion to dismiss plaintiff's first amended complaint, the court considered in its memorandum opinion, filed December 21, 1964, and discussed most of the contentions now being urged. The court has already ruled that the conduct complained of does not constitute the kind of "trade or commerce" contemplated by the Sherman Act, and although not previously discussed, for the same reasons it would appear that it does not constitute "trade or commerce" as contemplated by the Cartwright Act. With reference to the plaintiff's third cause of action, the court has already ruled that the restriction as to the recording of

master points is reasonable and logical under the circumstances, and is permissible.

Upon reconsidering the matters raised by the defendant's motion to dismiss, the court holds the same views as expressed in its memorandum opinion, and for these reasons the defendant's motion to dismiss plaintiff's second complaint is granted as to all counts.

Dated this 16th day of December, 1965.

Jesse W. Curtis /s/

APPENDIX C.
Judgment.

United States District Court, Southern District of California, Central Division.

Bridge Corporation of America, a corporation, Plaintiff, v. The American Contract Bridge League, Inc., etc., et al. Defendants. No. 64-897-JWC.

Filed January 3, 1966.

The motion of Defendants to dismiss all three alleged causes of action of Plaintiff's Second Amended Complaint having come on for hearing on November 29, 1965 before the Honorable Jesse W. Curtis, both parties appearing through their counsel, and the Court by Memorandum Opinion dated December 16, 1965 having granted said Motion, it is hereby

ORDERED, ADJUDGED AND DECREED that the First Cause of Action of Plaintiff's Second Amended Complaint be dismissed for lack of jurisdiction over the subject matter, that the Second and Third Causes of Action of Plaintiff's Second Amended Complaint be dismissed for failure to state a claim upon which relief can be granted, and that Defendants recover from Plaintiff their costs.

DATED: January 3rd, 1966.

Jesse W. Curtis

United States District Judge

APPENDIX D.

§16720. "Trust": Purposes. A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes:

(a) To create or carry out restrictions in trade or commerce.

(b) To limit or reduce the production, or increase the price of merchandise or of any commodity.

(c) To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity.

(d) To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State.

(e) To make or enter into or execute or carry out any contracts, obligations or agreements of any kind or description, by which they do all or any or any combination of any of the following:

(1) Bind themselves not to sell, dispose of or transport any article or any commodity or any article, use, merchandise, commerce or consumption below a common standard figure, or fixed value.

(2) Agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure.

(3) Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity.

(4) Agree to pool, combine or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

No. 20756

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRIDGE CORPORATION OF AMERICA,

Appellant,

vs.

THE AMERICAN CONTRACT BRIDGE LEAGUE, INC., *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

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No. 20756

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BRIDGE CORPORATION OF AMERICA,

Appellant,

vs.

THE AMERICAN CONTRACT BRIDGE LEAGUE, INC., *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

Commerce Is Involved.

The court below held that the business or commerce of supplying personnel and equipment for scoring duplicate bridge tournaments wasn't the *type* of commerce contemplated by the Sherman Act. But *U. S. v. du Pont* (Op. Br. p. 14) establishes that the Sherman Act extends to every type of commerce, all consistent with the broad language of the statute. Accordingly, defendants now contend that supplying personnel and equipment for scoring duplicate bridge tournaments isn't commerce at all.

Plaintiff was chartered as a profit-making corporation by the State of California for the specific purpose of providing personnel and equipment for scoring duplicate bridge tournaments. Plaintiff conducted that business in interstate commerce. On the face of it, this

commerce is of the typical variety. If it isn't, plaintiff is surely living a fantasy, having spent in excess of \$60,000.00 implementing this business.

If one were to understand the game of bowling only as a Sunday afternoon activity on the green, one might not appreciate that there could be any commerce in automatic pinspotting equipment. But there is. If one were to understand voting only in terms of a town hall meeting, one might not appreciate that there could be any business in supplying machines for tabulating, recording, cumulating votes. But there is. If one were to understand horse racing only in terms of a seventeenth century village sport, one might not appreciate that there could be any commerce in supplying personnel and equipment for tabulating and calculating results of wagering on horse racing. But there is. Similarly, if one were to understand the game of bridge only as an every-other-Wednesday game with Aunt Minnie, one could hardly appreciate that there could be any commerce in supplying personnel and equipment for scoring duplicate bridge tournaments. But there is.

Defendants' argument at page 19 of their brief¹ is no more than an improper attempt to have this court assume facts not in evidence, and determine *without benefit of trial* that duplicate bridge tournaments are in the same class as chess. But defendants carefully omitted boxing, football, etc.

¹"... Certainly the scoring of track meets, tennis matches, swimming meets, chess tournaments, or similar games and sports, could not reasonably be contended to be the type of trade or commerce contemplated by Congress in enacting the Sherman Act. And yet, this is exactly the type of activity involved in the present case."

In the Report of the Attorney General's National Committee To Study the Antitrust Laws, March 31, 1955, there is a section beginning at page 62 entitled "What is 'trade or commerce'?". The following language is pertinent:

"The words 'trade or commerce' used in Section 1 of the Sherman Act, and 'any part of the trade or commerce' in Section 2, take meaning both from their common law sense and from their part in a broad statutory plan. They have been construed to include all sorts of economic activities, so long as the requisite interstate effect is found. The term 'trade or commerce' is not limited to economic activities involving the production and physical movement of goods. Thus banking, insurance, finance, the business of conducting hospitals and making organized provision for medical care all may come within its scope."

One might not find in the Yellow Pages of the classified directory a heading Chess Tournaments—Direction and Scoring, or Tennis Matches—Direction and Scoring. But there is in the Yellow Pages of the Los Angeles classified directory Bridge—Duplicate Direction and Scoring. In the August 1963 issue of the Los Angeles classified directory there were two listings under this heading:

AMERICAN CONTRACT BRIDGE LEAGUE

11010 Sta Monica WLA

BR 2-7991

BRIDGE CORP OF AMERICA

2978 Wilshr

DU 3-4223

These listings clearly belie the vacuous contention of defendants that no commerce is involved. Moreover,

these listings evidence a direct competition between the plaintiff Bridge Corporation of America and the defendant American Contract Bridge League.

Bridge Is Big Business.

The defendant ACBL, according to Paragraph V of the Complaint [Tr. p. 135] and Exhibit C [Tr. p. 112], is in the business of directing tournaments; is in the business of hiring employees for compensation for the purposes of carrying out such business; is in the business of directing and scoring duplicate bridge tournaments and of paying fees and expenses to scorers and directors; is in the business of fixing emoluments to be paid to such persons by fixed schedule; is in the business of receiving fees for national tournament directors in an amount in excess of \$34,000.00; is in the business of selling supplies for duplicate bridge tournaments with income as of June 30, 1964 in excess of \$29,000.00; is in the business of maintaining an inventory for its tournament department in an amount in excess of \$50,000.00. Said League is further in the business of advertising its services to the public and represents to the public that its services are available for the direction and scoring of duplicate bridge tournaments. The defendant ACBL has accumulated total assets in excess of \$682,000.00; for the period ending June 30, 1964 received income of approximately \$557,000.00; maintains banking accounts in diverse states; owns securities having a market value of more than \$118,000.00; owns and maintains building and lease holds; is in the business of selling merchandise and service for compensation; is in the business of using media of communication and transportation for the facilitation of its busi-

ness; is in the business of making contracts for materials and services; is in the business of paying expenses of travel and lodging to tournament directors and scorers; etc.

The recently concluded Los Angeles Bridge Week cost between \$25,000 and \$30,000 just for scoring! This is certainly commerce—namely, the commerce that plaintiff is after and which defendants monopolize.

The Acts Complained of Support Jurisdiction Under the Sherman Act.

The acts complained of include the acquisition of monopoly power by defendant ACBL with respect to the *interstate* business of providing personnel and equipment for scoring duplicate bridge tournaments throughout the United States; the intent to use that power; the use of intimidation and coercion to effectuate a boycott by all the prospective customers of plaintiff throughout the United States. The acts complained of accordingly are of interstate character, and the perpetuation of a monopoly in a relevant market that encompasses the entire United States.

If the gravamen of the complaint were the monopolization of a local segment of commerce in Riverside and Redlands, which it is not, then the next inquiry would be whether or not those acts complained of had an appreciable effect upon interstate commerce. In *Page v. Work* and in *Lieberthal* the acts complained of were the monopolization of purely local segments of commerce and, accordingly, it was necessary to inquire whether or not there was any appreciable effect on interstate commerce. In *Page v. Work* the complained-of activities were the monopolization of a legal publication

business in the Los Angeles area, and in Lieberthal the acts complained of were the imposition of restraints on a particular bowling alley operation which was geographically confined.

In the case at bar the acts complained of were not geographically confined as in *Page v. Work* or in Lieberthal. Thus in defendants' own words (Op. Br. p. 13):

"In the present case the complained-of activities are simply those set out above—the League told its units that if plaintiff's computer were to be used to score a bridge tournament conducted by the units, then the League would not award its master points to the players competing in the tournament."

Now the units are *three or four hundred in number and are located throughout the United States*. Hence, it is altogether clear by defendants' own admission that the complained-of activities were national in scope.

Apex Hosiery Is Clearly Distinguishable.

The *Apex Hosiery* case, contrary to defendants' assertion (Op. Br. p. 15), does not establish that certain non-commercial organizations are outside the scope of the Sherman Act. This is believed to be an unjustified generalization of that opinion. The defendants were simple tort feasers involved in a labor dispute who had not the remotest desire to monopolize the hosiery business. In the case at bar there is a direct purpose of defendants to monopolize the very business that plaintiff is in.

Lack of a Direct Precedent Is No Bar to Relief.

Defendants point out (Op. Br. pp. 17-18) that there is no precedent specifically holding that the prohibition of the Sherman Act extends to the scoring of bridge games played at tournaments. If specific precedents were required, which they are not (*United States v. du Pont, supra*), the Sherman Act would fast become a relic of history.

A Restraint Exists When Viewed From the Business Standpoint.

The "complained-of activities" of defendants have, contrary to the policy of the Sherman Act, eliminated from interstate commerce the business enterprise of plaintiff. District Judge Symes in *United States v. National Retail Lumber Dealers Association*, 40 Fed. Supp. 448, at page 458, quoted with approval an opinion in *Patterson v. United States*, 222 Fed. 599, cert. denied 238 U.S. 635:

"8. To bring a conspiracy within Act July 2, 1890, §1, it is not essential that its execution be of any benefit to the conspirators; it being sufficient that it will be in restraint of another's interstate trade or commerce."

The Cartwright Act Applies.

Defendants argue that if commerce is not involved for purposes of the Sherman Act, necessarily there is no commerce involved for purposes of the Cartwright Act. But if commerce is involved for purposes of the Sherman Act, correspondingly commerce is involved for purposes of the Cartwright Act.

There may be a specific exception in California law to the effect that the practice of medicine is not commerce. This is all *Osteopathic Physicians & Surgeons v. Calif. Medical Assoc.* stands for. The business of plaintiff and defendant ACBL hardly falls within the category of the practice of medicine. Services are certainly a commodity of commerce within the meaning of the Cartwright Act, and as clearly established by *Babcock v. Crafts 20 Big Shows* (Op. Br. p. 29).

Reasonableness Is a Question of Fact for the Jury.

The court below held: "Since the very basis of the League's appeal to the membership is the Master Point plan, it seems only reasonable and logical that the League should seek to control the mechanics of scoring." This is a *finding of fact* on the very issue of reasonableness. Plaintiff insists upon its day in court to establish that the conduct in question is indeed unreasonable.²

If automatic pinspotting equipment accurately and efficiently performs the task of setting pins and displaying the results achieved by bowlers, it makes little difference to the National Bowling Congress whether AMF equipment or Brunswick equipment is used. Plaintiff insists that it would be unreasonable for the National Bowling Congress, which keeps records as to the achievements of bowlers, to coerce bowling leagues into using only Brunswick equipment under the threat of withholding awards.

So long as the wagering is accurately tabulated and computed, it makes very little difference to a person col-

²Even in *Deesen v. P.G.A.*, 358 F. 2d 165, cited by defendants, there *was* a trial and a finding of fact that the rules of the P.G.A. were reasonable.

lecting winnings (the measure of merit) whether the equipment accomplishing that task is that of the American Totalizator Company or some other company. So long as votes are accurately tabulated and computed, the winning office seeker cares little whether the voting machines are made by Cubic Corporation, Westinghouse, General Electric or someone else. So also here it makes no difference whatsoever to the maintenance of the award system of defendant ACBL whether the tournament results are tabulated and computed by Bridge Corporation of America, Minneapolis-Honeywell, the defendant ACBL or others. The award system is only interested in *who* won, not *how* the scoring was accomplished. The assumption by the lower court that there is any legitimate relationship between its Master Point plan and the mechanics of scoring is erroneous and wholly unjustified. Plaintiff is entitled to a trial on this very issue.

There Has Been an Unlawful Interference With Prospective Economic Advantage.

Show Management v. Hearst Publishing, cited by the appellees (Op. Br. p. 25), establishes the proposition that justification for interference is an affirmative defense and, like any other affirmative defense, it must be proved unless, of course, the defense appears on the face of the Complaint. In the *Show Management* case the parties were direct competitors in the business of conducting a sportsman's type show. There was no allegation in the *Show Management* case that the defendant had ever directly contacted any of plaintiff's customers. All that defendant had ever done was to advertise its show by conventional newspaper media. The only unlawful acts complained of were those of mis-

leading advertising for which the court found no remedy in accordance with the leading "washboard" case. In the *Show Management* case the court accordingly found that the privilege involved was one of competition. In the case at bar there was direct contact and coercion of plaintiff's prospective customers.

The authorities cited by the appellant are rooted in the decision of the Supreme Court of California in *Imperial Ice Co. v. Rossier, et al.*, 18 Cal. 2d 33, 112 P. 2d 631. The Supreme Court endorsed a rule setting forth the bounds of privileged competition as follows, at page 634:

" . . . Competition in business, though carried to the extent of ruining a rival, is not ordinarily actionable, but every trader is left to conduct his business in his own way, so long as the methods he employs do not involve wrongful conduct such as fraud, misrepresentation, *intimidation, coercion, obstruction, . . .*" (Emphasis added.)

In the case at bar we have a clear case of intimidation and coercion, namely, the threat of withholding the granting of awards should the customer in question do business with the plaintiff Bridge Corporation of America.

In *Lawless v. Brotherhood of Painters* (Op. Br. p. 24) the defendant brotherhood was in a confidential relationship with the local in question by virtue of the fact that it was responsible, at least to some extent, for the debts of the local, and that it had a right to the assets of the local upon dissolution. This was held sufficient to create the "confidential relationship". But in the case at bar the trier of facts need only examine the rela-

tionship of the ACBL to the individual units. As shown by Exhibit B [Tr. p. 110], it is manifestly clear that the defendant ACBL has no financial interest whatsoever in the individual units. Moreover, the defendant ACBL suggests to the units the following bylaw provision to the units [Tr. p. 108]: "To acquire, hold, administer, maintain and dispose of all the property of the Unit." Accordingly, the relationship between the ACBL and the several units is that of a trade association to its members, and there is no confidential relationship between such trade association and its members. The court below recognized in its Memorandum Opinion [Tr. p. 128] that some of the units are separate corporations. If there is a "confidential relationship", let the defendants plead and prove it. This is a matter of defense.

The two other cases cited by the appellees (Op. Br. p. 25) are similarly irrelevant. In *Wise v. Southern Pacific Co.*, employees of the corporate defendant caused the corporate defendant to breach a contract. There is no allegation that the individual employee defendants were acting in any capacity other than that of employee and, accordingly, there was a confidential relationship. But in the case at bar the defendant ACBL is not and was not an employee or officer or director of either the Riverside or Redlands units which were caused to terminate their arrangements with the plaintiff Bridge Corporation of America.

In *Sullivan v. Warner Bros. Theatres, Inc.*, defendant simply posted signs at its establishment requesting patrons not to patronize an ice cream store in the vicinity. This was a libel case in which the issues of confidentiality or privilege were not raised. In any event,

the defendant did not use unjustified coercion, such as refusing admission to those who patronized the plaintiff.

The issue of privilege or confidential relationship is one that must be decided after consideration of all circumstances. In the *Imperial Ice Co. case, supra*, the Supreme Court stated, at page 632:

"... Most jurisdictions also hold that an action will lie for inducing breach of contract by the use of moral, social, or economic pressures, in themselves lawful, unless there is sufficient justification for such inducement. [Citing cases.]

"Such justification exists when a person induces a breach of contract to protect an interest which has greater social value than insuring the stability of the contract."

It is manifestly clear that the trier of facts must evaluate whether there is any social value whatsoever in the actions taken by the defendant ACBL, all in relationship to the social value of free competition and the free interplay of market forces. Plaintiff submits and proposes to prove at trial that there is no social justification whatsoever and, accordingly, no privilege.

Conclusion.

It is submitted that the court erred in deciding factual issues such as reasonableness. It is submitted that the court erred in confining the scope of the Sherman Act to classical types of commerce and contrary to *United States v. du Pont, supra*. It is submitted that the Complaint states a cause of action for which jurisdiction exists under the Sherman Act. It is submitted, moreover, that the Complaint states a full and complete

cause of action under the Sherman Act, the Cartwright Act and under the common law theory of unjustified interference with prospective economic advantage.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

FRED FLAM

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WAYNE JOHNSON, An Individual, d/b/a
CARMICHAEL FLOOR COVERING Co.

and

JOHN DUNCAN, An Individual, d/b/a
DUNCAN FLOOR Co., RESPONDENTS

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 20,760

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WAYNE JOHNSON, An Individual, d/b/a
CARMICHAEL FLOOR COVERING CO.

and

JOHN DUNCAN, An Individual, d/b/a
DUNCAN FLOOR CO., RESPONDENTS

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against respondents on November 9, 1965, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73

Stat. 519, 29 U.S.C., Sec. 151, *et seq.*)¹ The Board's decision and order (R. 38-39)² are reported at 155 NLRB No. 65. This Court has jurisdiction, the unfair labor practices having occurred in Sacramento, California. No jurisdictional issue is presented (R. 9; Tr. 10-11). The charges against the two respondents were consolidated by the Board for hearing (R. 3-7).

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that respondents refused to bargain with the Union,³ in violation of Section 8 (a) (5) and (1) of the Act, by refusing to acknowledge that they were bound by a collective bargaining agreement executed on their behalf and by contracting out their floor covering installation operations without first bargaining with the Union.

A. The Bargaining History

Prior to April 8, 1964, both respondents were members of the Sacramento Valley Floor Covering

¹ The relevant statutory provisions are reproduced in Appendix A, *infra*, pp. 22-29.

² References designated "R." are to Volume I of the record, reproduced pursuant to Rule 10 of this Court. References designated "Tr." are to the transcript of testimony, reproduced in Volume II of the record. References designated "G. C. Ex." and "R. Ex." are to exhibits of the General Counsel and respondents, respectively. Those references preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

³ Carpet, Linoleum and Soft Tile Local Union No. 1237, Brotherhood of Painters, Decorators, and Paperhangers of America, AFL-CIO.

Association (hereafter "the Association"). Since 1954, the Association had represented, for purposes of collective bargaining with the Union, various employers engaged in the sale and installation of floor covering material (R. 22-23; 9-10). The members of the Association, and sometimes other employers, authorized the Association to negotiate and execute a series of contracts with the Union covering their installation employees. These agreements were negotiated and signed by the Association on behalf of those employers whom it was authorized to represent (R. 23; Tr. 15, G.C. Exh. 2, 7, 17).

Respondent Johnson, doing business as Carmichael Floor Covering Company (hereafter "Carmichael"), had been a member of the Association since its inception (R. 23; Tr. 151-152). On January 2, 1963, Carmichael signed an authorization under which the Association was authorized to represent Carmichael in collective bargaining with the Union (R. 23; Tr. 153, R. Ex. 3). Carmichael never formally revoked the authorization, which by its own terms remained effective unless revoked by a 30-day written notice (R. 23; Tr. 161, 167-168, R. Ex. 3).

Duncan Floor Company (hereafter "Duncan") became a dues-paying member of the Association in August 1963 (R. 23; Tr. 101-102, 108). However, on May 11, 1962, Duncan had signed an authorization empowering the Association "to negotiate, execute and enter into collective bargaining agreements" with the Union. The authorization was to remain in effect until the end of the calendar year 1962 (G.C. Exh. 24). In a letter to the Union dated May 16,

1962, the Association listed Duncan as one of the employers whom it was authorized to represent in contract negotiations (G.C. Exh. 3).

On June 1, 1962, the Association and the Union executed a collective bargaining agreement, which was automatically renewable from year to year unless either party gave timely written notice of its intention to alter or terminate the agreement (G.C. Exh. 2). Both Duncan and Carmichael considered themselves bound by the agreement and both complied with its terms (R. 23; Tr. 18, 116-117, 169-170).

B. The 1963-1964 Negotiations

In March 1963, the Union gave notice that it desired to open the agreement (R. 24; G.C. Exh. 4). On May 20, 1963, the Association forwarded to the Union a list of the employers whom it represented, including both Duncan and Carmichael (R. 24; G.C. Exh. 5). A similar list forwarded on June 3, 1963, also contained the names of both Duncan and Carmichael (G.C. Exh. 6). Negotiations between the Association and the Union resulted in an interim agreement, which was executed on June 6, 1963 (R. 24; Tr. 20, G.C. Exh. 7). The interim agreement provided for certain wage increases and extended all other terms of the previous contract until such time as the Union presented for signature its locally prevailing standard collective bargaining agreement (G.C. Exh. 7). Both Duncan and Carmichael considered themselves bound by the interim agreement (R. 24; Tr. 134-135, 169-170).

Among the contract terms that were extended by the interim agreement were certain restrictions on subcontracting (R. 25; G.C. Ex. 2). The Association filed charges with the Board alleging that the subcontracting provisions violated Section 8(e) of the Act.⁴ The parties reached a settlement agreement, approved by the Board, under which the Union agreed not to give effect to these subcontracting restrictions. (R. 24-25; Tr. 92, 171-172, G.C. Ex. 25). The parties then agreed upon the following new provision on subcontracting, which was contained in the complete collective bargaining agreement presented to the Association by the Union in late September 1963 (R. 25; Tr. 34-35, 91-92, G.C. Ex. 17):

Employer agrees to refrain from contracting out unit work now being performed by his employees covered by this contract.

The Association did not immediately sign the complete contract, as it had agreed to do in the interim agreement (R. 25; Tr. 71). The Union was advised by its counsel that a signed agreement was necessary to make the fringe-benefits provisions binding on the employers (R. 25; Tr. 85). Thereupon, the Union approached many of the employers individually and obtained their signatures on contracts identical to one presented to the Association (R. 25; Tr. 85-86, G.C. Ex. 8, 9, 17). Duncan and Carmichael both signed individual agreements (R. 25; Tr. 23-26, G.C. Ex. 8, 9).

⁴ Reproduced at p. 26, *infra*.

On October 2, 1963, the Union was notified in a letter signed by both Carmichael and the Association that Carmichael had authorized the Association "to execute all documents and contracts pertaining to matters of collective bargaining." The letter also declared that all contracts or other documents signed by Carmichael individually were null and void and that Carmichael was "bound by the provisions of all agreements, addendums and commitments" made for and on its behalf by the Association (R. 25; Tr. 26-27, G.C. Ex. 10). On October 16, 1963, the Association sent the Union a letter listing the employers, including both Duncan and Carmichael, whom it represented "under power of attorney." The letter declared that the Association had exclusive authority to execute collective bargaining agreements for the listed employers and that all agreements signed individually by the employers were null and void. The letter also noted that copies had been sent to the members of the Association (R. 25-26; G.C. Ex. 12).

On January 16, 1964, the Association advised the Union that Carmichael had changed its status as an employer and would contract out all work and service covered by the collective bargaining agreement (R. 26; Tr. 29-30, G.C. Ex. 14). The Union immediately protested to the Association that the contracting out would be contrary to its agreement not to contract out unit work (R. 26; Tr. 30, 58-61). Carmichael, after being informed by a representative of the Association that he had to negotiate with the Union before contracting out, abandoned its subcon-

tracting plans and continued to use its own employees for installation work (R. 26; Tr. 30, 170-171).

By early April 1964, the complete agreement had still not been signed by the Association. On April 6, the Union advised the Association that unless it signed the locally prevailing agreement by midnight, April 10, the employers listed as signatory members of the Association would not have employees supplied under the terms of the agreement (R. 26; Tr. 32-33, G.C. Exh. 16).⁵ The Association signed the agreement and submitted it to the Union on April 8, 1964. Nothing was mentioned concerning the authority of the Association to represent Duncan or Carmichael (R. 27; Tr. 34-35). The agreement finally executed was the same one submitted to the Association in September (R. 26; Tr. 33-35, G.C. Exh. 17).

C. Respondents contract out their installation work without bargaining with the Union

On April 9, the day after the execution of the agreement, the Association stated in a letter to the Union that Duncan and Carmichael had "discontinued their operations as employing contractors and will not be party to the Master Agreement, as all installation will be done by labor contractors parties to the agreement" (R. 26; Tr. 35-36). Carmichael and Duncan terminated their installation employees on April 10 (R. 27; Tr. 66, 126-128, 160-163). At no

⁵ In Section 2 of the agreement, the Union agreed to furnish as many competent workmen as needed by members of the Association. The employers, however, retained "entire freedom of selectivity in hiring" (G.C. Exh. 17).

time prior to the termination of the employees did either Duncan or Carmichael, or the Association acting on their behalf, undertake to bargain with the Union concerning the decision to contract out installation work (R. 27).

After April 10, Carmichael and Duncan continued in business as before, except that each relied on the employees of other contractors to do installation work (R. 27; Tr. 112-113, 158-162). Duncan continued to make bids and contracts with his customers for a total price, including both material and installation costs (Tr. 112-113). After being terminated on April 10, two of Carmichael's three regular employees did not have steady work, and the third employee dropped out of the Union and went to work for an employer not covered by the agreement with the Union (Tr. 43-44). Of Duncan's five regular carpet layers, four had little work after April 10 (Tr. 45-47). Carmichael subcontracted all linoleum installation work to a contractor not covered by the union agreement (Tr. 43-44, 162-164). Duncan relied on a single subcontractor for all installation work, and none of Duncan's employees became employees of the subcontractor (Tr. 67, 77-78).

II. The Board's Conclusions and Order

The Board affirmed the Trial Examiner's finding that both Duncan and Carmichael had authorized the Association to negotiate and execute agreements with the Union on their behalf during the 1963-1964 negotiations (R. 23-24; Tr. 38-39). The Board also agreed with the Trial Examiner that neither Duncan nor

Carmichael had made a timely withdrawal from the multi-employer bargaining unit and that both were bound by the agreement signed by the Association on April 8, 1964 (R. 28). Accordingly, the Board found that both respondents had violated Section 8(a)(5) and (1) of the Act by refusing to acknowledge that they were bound by the agreement signed on their behalf and by contracting out their installation work without bargaining with the Union (R. 28-29).

The Board ordered respondents to cease and desist from the unfair labor practices found and to bargain with the Union by acknowledging the binding effect of the agreement signed on April 8, 1964. The Board also ordered respondents to resume the installation operations which they had unlawfully discontinued and to reinstate with payment of lost wages those employees who had been terminated on April 10, 1964 (R. 33-34).

SPECIFICATION OF POINTS RELIED UPON

1. Substantial evidence on the record considered as a whole supports the Board's finding that respondents violated Section 8(a)(5) and (1) of the Act by refusing to acknowledge that they were bound by the agreement signed on April 8, 1964.

2. Substantial evidence on the record considered as a whole supports the Board's finding that respondents violated Section 8(a)(5) and (1) of the Act by unilaterally contracting out their installation work without notifying or consulting with the Union.

3. The Board's order is valid and proper.

ARGUMENT

I. Substantial Evidence On The Record Considered As A Whole Supports The Board's Finding That Respondents Violated Section 8(a)(5) And (1) Of The Act By Refusing To Acknowledge That They Were Bound By The Agreement Signed On April 8, 1964

As the Statement shows, prior to April 8, 1964, the Association had negotiated and executed collective bargaining agreements with the Union on behalf of both respondents. Then, more than 10 months after negotiations had begun for a new contract, respondents attempted to withdraw from the multi-employer bargaining unit, repudiated the contract which had been negotiated by the Association and the Union, and immediately disregarded the agreed-upon prohibition against the contracting out of work. We show below that respondents' attempts to withdraw from the multi-employer unit were not effective and that their refusals to accept the multi-employer agreement constituted refusals to bargain in violation of Section 8(a)(5) and (1) of the Act.

A. *Introduction and Controlling Principles*

The value of multi-employer bargaining to the development of stable and responsible industrial relations has been widely recognized.⁶ Negotiations on such a basis have been a "vital factor in the effectua-

⁶ See, e.g., *N.L.R.B. v. Truck Drivers Local 449, Teamsters (Buffalo Linen)*, 353 U.S. 87, 95; Report of General Subcommittee on Labor, House Committee of Education and Labor, 88th Cong. 2d Sess., "Multiemployer Association Bargaining and its Impact on the Collective Bargaining Process" (Comm. Print'g 1965).

tion of the national policy of promoting labor peace through strengthened collective bargaining." *Buffalo Linen, supra*, 353 U.S. at 95. The central feature of such bargaining, through which the desired stability of collective bargaining is achieved, is the standardization of contract terms for the employers within the bargaining unit. Clearly, such standardization could not be achieved if an individual employer, having manifested an intent to be bound by group bargaining, could refuse to be bound by the results of that bargaining (*New York Mailers' Union Number Six, ITU, AFL-CIO v. N.L.R.B.*, 327 F. 2d 292, 297-298 (C.A. 2)), and could thereby withdraw from the multi-employer group simply because he disagreed with specific proposals made by it as his representative or disagreed generally with the course of the negotiations. In short, multi-employer bargaining can only be meaningful where the employer members of the unit, like the union, are bound by the agreement concluded on their behalf by their representative. Thus, an employer violates its statutory bargaining obligation when it refuses to be bound by an agreement reached by its authorized multi-employer bargaining representative. *N.L.R.B. v. Jeffries Banknote Co.*, 281 F. 2d 893, 896 (C.A. 9), enforcing 124 NLRB 920; *Universal Insulation Corp. v. N.L.R.B.*, 62 LRRM 2223 (C.A. 6, May 20, 1966); *Cooke & Jones, Inc.*, 146 NLRB 1664, 1673-1674, enforced, 339 F. 2d 580 (C.A. 1); *Ice Cream, Frozen Custard Employees, Local 717, Teamsters (Ice Cream Council, Inc.)*, 145 NLRB 865, 871-872; *Kasco Trucking Corp.*, 133 NLRB 627, 629, 633-635; *Fairbanks Dairy*, 146 NLRB 893, 897-898, 904; *Walker Electric Co.*, 142 NLRB 1214, 1220-

1221, 1226. As we show below, the Board properly found that respondents were bound by the agreement signed on April 8, 1964.

The Board, charged with applying its "specialized judgment [to] the inevitable questions concerning multi-employer bargaining. . ." (*Buffalo Linen, supra*, 353 U.S. at 96), has developed certain ground rules governing the conduct of parties engaged in such bargaining. These rules, which the Board has developed in the exercise of its wide discretion in determining the unit appropriate for bargaining,⁷ are designed to assure the stability which is the major objective of multi-employer bargaining, and, at the same time, to allow for certain flexibility in recognition of the consensual nature of such bargaining.⁸ Experience has shown that the "labor peace" which multi-employer bargaining has fostered stems from the stability of bargaining relationships and uniformity of contract terms which are achieved by bargaining on a group basis. *Buffalo Linen, supra*, 353 U.S. at 94-96. A "common front [is] essential to multi-employer bargaining." *N.L.R.B. v. Brown, et al.*, 380 U.S. 278, 284. Thus, since the union and the employers formulate bargaining positions which they may not have adopted if bargaining were on an indi-

⁷ See, e.g., *N.L.R.B. v. B. H. Hadley, Inc.*, 322 F. 2d 281, 284 (C.A. 9); *N.L.R.B. v. Moss Amber Mfg. Co.*, 264 F. 2d 107, 110 (C.A. 9); *Foreman & Clark, Inc. v. N.L.R.B.*, 215 F. 2d 396, 405-406 (C.A. 9), cert. denied, 348 U.S. 887.

⁸ Compare *Jeffries Banknote Co., supra*, with *Retail Clerks Union No. 1550 v. N.L.R.B.*, 330 F. 2d 210 (C.A.D.C.), cert. denied, 379 U.S. 828.

vidual basis, no purpose could be served by bargaining on a group level if unrestricted withdrawal from the multi-employer unit were permitted. Therefore, the Board has held that, although participating in multi-employer bargaining is consensual in nature, withdrawal must be accomplished in an unequivocal manner, and must be made at an appropriate time. *Bell Bakeries of St. Petersburg, etc.*, 139 NLRB 1344, 1345-1346; *Evening News Association*, 154 NLRB No. 121, 60 LRRM 1149. Accordingly, once an employer has committed itself to engage in group bargaining, it is bound by the results of that bargaining unless "it clearly evinces at an appropriate time its intention of pursuing an individual course in bargaining." *N.L.R.B. v. Sklar, et al.*, 316 F. 2d 145, 150 (C.A. 6), and cases there cited.

B. Respondents' attempts to withdraw were untimely

The Board has repeatedly found to be timely, and has recognized as valid, withdrawals made during the period between the expiration of a group contract and the initiation of negotiations for a new contract.⁹ On the other hand, it has found to be untimely an employer's attempt to withdraw from a multi-employer bargaining association after he not only has participated in the negotiation for a new group contract

⁹ *Evening News Association, supra*; *Seattle Automotive Wholesalers Ass'n, etc.*, 140 NLRB 1393, 1396-1397; *20th Century Press*, 107 NLRB 292, 293. See also, *York Transfer & Storage Co.*, 107 NLRB 139, 140-142; *Milk and Ice Cream Dealers of Greater Cincinnati Area*, 94 NLRB 23, 24-25.

but has signed the new contract executed by the association.¹⁰ Moreover, in the Board's view, once contract negotiations have commenced, a complete withdrawal from the multi-employer unit is untimely, and therefore ineffective, unless it is done with mutual consent or unusual circumstances are present. *The Kroger Co.*, 148 NLRB 569; *Retail Associates, Inc.*, 120 NLRB 388, 395; *Ice Cream, Frozen Custard Industry Employees, Local 717, Teamsters (Ice Cream Council, Inc.)*, 145 NLRB 865, 869-872; *Walker Electric Co.*, 142 NLRB 1214, 1220-1221; *Detroit Window Cleaners Union, Local 1391 (Daelyte Service Co.)*, 126 NLRB 63; *Spun-Jee Corp.*, 152 NLRB No. 96, 59 LRRM 1206. See also, *International Restaurant Associates*, 133 NLRB 1088, 1089-1091. Thus, once the union and the employers' representative have begun joint bargaining, having formulated and revealed their bargaining positions on a group basis, the stability of the bargaining process ordinarily requires that an individual employer not be allowed to withdraw from the unit at that juncture without the union's consent. *N.L.R.B. v. Jeffries Banknote Co.*, *supra*, 281 F. 2d at 896, enforcing 124 NLRB 920; *Cooke & Jones, Inc.*, 146 NLRB 1664, 1673-1674, enforced, 339 F. 2d 580 (C.A. 1); *The Kroger Co.*, *supra*; *Fairbanks Dairy, etc.*, 146 NLRB 893, 897-898. As the Second Circuit recently stated in

¹⁰ *McAnary & Welter, Inc.*, 115 NLRB 1029, 1030-1032; *Engineering Metal Products Corp.*, 92 NLRB 823, 824. See also, *Northern Nevada Chapter, National Electrical Contractors Assn.*, 131 NLRB 550, 551-552; *Donaldson Sales, Inc.*, 141 NLRB 1303, 1305.

N.L.R.B. v. Sheridan Creations, Inc., 357 F. 2d 245, 248:

A shift in membership [in multi-employer bargaining] has lively possibilities for disrupting the bargaining process . . . [T]he potential for disruption is sufficient to justify the Board in adopting a uniform rule for all cases that withdrawal is not timely once bargaining has begun. 10a

As shown by the statement, pp. 2-7, both Carmichael and Duncan were members of the multi-employer unit covered by the 1962 collective bargaining contract. As the negotiations for a new contract began in the spring of 1963, the Association twice informed the Union in writing that it was authorized to bargain for both Carmichael and Duncan. Both respondents considered themselves bound by the interim agreement reached in June of 1963. The interim agreement by its own terms contemplated that further negotiations leading to a full contract were to be undertaken. Both respondents knowingly permitted the Association to represent to the Union in October of 1963, not only that the Association had authority to negotiate and execute agreements on their behalf, but also that the individual contracts signed by respondents were null and void (p. 6, *supra*). At no time prior to the signing of the April 8 agreement was the Union notified that respondents intended to withdraw from group bargaining. Before the Board, respondents contended that each notified the Association of its intent to withdraw shortly before the signing of the agreement. Withdrawal at such a late state in negotiations, however, is clearly

^{10a} Accord: *Universal Insulation Corp. v. N.L.R.B.*, 62 LRRM 2223 (C.A. 6, May 20, 1966).

untimely under the judicially approved Board standards discussed, *supra*, pp. 13-15.¹¹

Immediately after attempting to withdraw from the multi-employer unit, both respondents began contracting out installation work, which was a matter upon which the Union and the Association had already bargained and reached agreement. If individual members of a multi-employer unit were permitted to withdraw in the course of negotiations and to take action without regard for agreed-upon terms, as respondents did here, the result would be to render meaningful multi-employer bargaining impossible. See discussion, *supra*, pp. 10-13. Thus, we submit, respondents must be deemed bound by the April 8 agreement and their refusals to acknowledge its binding effect constituted refusals to bargain in violation of Section 8(a)(5) and (1) of the Act. *N.L.R.B. v. Jeffries Banknote Co.*, and other cases cited at pp. 14-15, *supra*; see also, *N.L.R.B. v. Hyde*, 339 F. 2d 568, 572 (C.A. 9).

¹¹ The Board noted that the Association's failure to mention Carmichael or Duncan when the agreement was signed suggested that respondents had not yet notified it of their intent to withdraw. However, the Board did not find it necessary to reach the question of whether respondents notified the Association shortly before or shortly after the agreement was signed, since the notification would not have been timely in either event (R. 27-29). Even assuming, *arguendo*, that withdrawal shortly prior to the signing of the agreement would have been timely, respondents' notices of withdrawal would not have been effective until they were communicated to the Union, which was after the signing of the agreement. *Walker Electric Co.*, 142 NLRB 1214, 1220-1221; *Detroit Window Cleaners Union, Local 1391*, 126 NLRB 63, 64-65.

II. Substantial Evidence On The Record Considered As A Whole Supports The Board's Finding That Respondents Violated Section 8(a)(5) And (1) Of The Act By Unilaterally Contracting Out Their Installation Work Without Notifying Or Consulting With The Union

The contracting out of work being performed by employees in a bargaining unit is a mandatory subject of collective bargaining under Section 8(a)(5) and 8(d) of the Act, and an employer, even though not motivated by anti-union animus, violates those provisions of the Act by contracting out without first bargaining with the union representing the employees. *Fibreboard Paper Products v. N.L.R.B.*, 379 U.S. 203, 209-215; *N.L.R.B. v. American Manufacturing Co. of Texas*, 351 F. 2d 74, 79 (C.A. 5). Cf., *United Indus. Workers of Seafarers, etc. v. Board of Trustees*, 351 F. 2d 183, 190-191 (C.A. 5).

The same considerations that support the Supreme Court's decision in *Fibreboard* apply in the present case. First, as in *Fibreboard*, respondents did not alter their basic operation but relied on the employees of independent contractors instead of their own employees for installation work. Both respondents continued to be concerned with the performance of the installation work. Carmichael was interested in having its installing contractors use employees with whom Carmichael was familiar (Tr. 161-162). Carmichael also cosigned a note in order to enable one of its contractors to purchase equipment (Tr. 160). Duncan relied on one contractor for all its installation work and continued to make bids and contracts for a total price, including the cost of both material and installation (Tr. 67, 112-113). Thus, respond-

ents did not abandon responsibility for their installation work, but merely relied on the employees of independent contractors to do the same work that had formerly been done by their own employees. As in *Fibreboard*, the work was still needed by respondents and the conditions of its performance were not substantially different from those which existed before the contracting out.

Respondents' decisions to rely on installation contractors had significant impact on the terminated employees and the Union. Two of Carmichael's three regular employees did not find steady work and the third employee dropped out of the Union. Four of Duncan's five regular carpet layers had little work after April 10. An employer's statutory bargaining duty "plainly cover[s] termination of employment which . . . necessarily results from contracting out of work performed by members of the established bargaining unit." *Fibreboard, supra*, 379 U.S. at 210. Although a substantial number of the employees of the installation contractors used by respondents may have been represented by the Union, the Union had no assurance that respondents would rely on union contractors. In fact, Carmichael contracted its linoleum installations to an employer who had no agreement with the Union.

There is no merit in respondents' contention that *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, relieves an employer of any duty to bargain concerning the contracting out of work. In the first place, *Darlington* involved the closing of an entire plant, not the substitution of one group of employees

for another in a continuing operation. The Supreme Court specifically distinguished those cases where part of a business is closed "but the work is continued by independent contractors" 380 U.S. 272-273, n. 16. Moreover, the Court, in *Darlington*, was not concerned with the employer's duty to bargain under Section 8(a)(5) of the Act; the issue there was whether the employer violated Section 8(a)(3) by closing its plant for antiunion reasons.

Although the Association had been involved with the Union in Board proceedings concerning sub-contracting restrictions, and although the collective bargaining agreement contained a prohibition against contracting out, respondents did not consult or negotiate with the Union prior to reaching their decisions to contract out installation work. Respondents merely presented their decisions to the Union as accomplished facts, thus failing to satisfy even the minimal requirement of Section 8(a)(5). "An employer must at least inform the Union of its proposed actions under the circumstances which afford a reasonable opportunity for counter arguments or proposals." *N.L.R.B. v. Citizens Hotel Co.*, 326 F. 2d 501, 505 (C.A. 5). Accord: *Fibreboard*, 379 U.S. at 214. Therefore, we submit, respondents' unilateral decisions to contract out were refusals to bargain in violation of Section 8(a)(5) of the Act.¹²

¹² In a concurring opinion in *Fibreboard*, Mr. Justice Stewart (speaking for himself and Justices Douglas and Harlan) indicated that collective bargaining would not be mandatory on "[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise," which "are not

III. The Board's Order Is Valid And Proper

The Board's order requires respondent to reinstate their installation operations and to offer reinstatement to the employees terminated as a result of the contracting out. Respondents contend that the remedy is impractical since they have abandoned installation work, have disposed of their equipment, and do not desire to resume installation. We submit, however, that the Board's order provides a reasonable and effective remedy for the unfair labor practice and falls well within the Board's express powers.

Section 10(c) of the Act authorizes the Board, on finding an unfair labor practice, to require an employer "to take such affirmative action including reinstatement of employees with * * * backpay, as will effectuate the policies of the Act." As the Supreme Court has pointed out, the design of remedies is "committed to the Board, subject to limited judicial review." *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194. See also, *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344; *N.L.R.B. v. Gullett Gin Co.*, 340 U.S. 361, 362-363; *International Association of Ma-*

in themselves primarily about conditions of employment" and which "lie at the core of entrepreneurial control." (*Id.* at 223.) The majority of the Court drew no such a distinction. In any event, respondents did not contend before the Board that their decisions to contract were essentially matters of capital investment or liquidation. The record is clear that both respondents were primarily interested in delegating their installation operations and relieving themselves of their installing employees (Tr. 136-137, 157-158). Any sale of tools or machinery was merely incidental to the contracting out of the installation work itself. See, *N.L.R.B. v. Northwestern Publishing Co.*, 343 F. 2d 521, 526 (C.A. 7).

chinists v. N.L.R.B., 311 U.S. 72, 82; *Virginia Electric and Power Co. v. N.L.R.B.*, 319 U.S. 533, 540. Typically, as here, the remedial order issued by the Board is designed to remove the effects of the unfair labor practice by effecting "a restoration of the situation, as nearly as possible, to that which would have obtained but for [the unfair labor practice]." *Phelps-Dodge, supra*, 313 U.S. at 194. The Board's order should stand if it is reasonably "adapted to the situation which calls for redress." *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348. In *Fibreboard*, the Supreme Court enforced the Board's order requiring the Company to resume the operation it had contracted out for lawful economic reasons and to reinstate the employees with backpay. Substantially identical orders have been enforced where such action was motivated by antiunion considerations. See for example, *N.L.R.B. v. Bank of America*, 130 F. 2d 624, 628-629 (C.A. 9), cert. denied, 318 U.S. 791, enforcing in this respect, 26 NLRB 198, 210-213; *Butler Brothers v. N.L.R.B.*, 134 F. 2d 981, 985 (C.A. 7), cert. denied, 320 U.S. 789, enforcing 41 NLRB 843, 868-870; *N.L.R.B. v. Preston Feed Corp.*, 309 F. 2d 346, 352 (C.A. 4); *Town & Country Mfg. Co. v. N.L.R.B.*, 316 F. 2d 846, 847 (C.A. 5); *N.L.R.B. v. Brown-Dunkin Co.*, 287 F. 2d 17 (C.A. 10), enforcing 125 NLRB 1379, 1386, 1389; *N.L.R.B. v. Kelly & Picerne*, 298 F. 2d 895, 899 (C.A. 1); *N.L.R.B. v. Cape County Milling Co.*, 140 F. 2d 543, 546 (C.A. 8).

The Board's order in the present case places no unreasonable burden on respondents. It does not re-

quire respondents to maintain installation operations indefinitely. After they have satisfied their bargaining obligation, respondents will be free to contract the work out, if they still desire to do so. Nor does the order require respondents to purchase new equipment on a permanent basis. They could, for example, rent or lease equipment temporarily while bargaining with the Union. As discussed, *supra*, pp. 17-18, respondents have not altered the basic nature of their operations but have merely relied on independent contractors for installation work. They continue to sell the same products and there is no indication of any change in the types of customers they serve.

CONCLUSION

For the reasons stated above, we respectively submit that a decree should issue enforcing the Board's order in full.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * *

(d) For the purpose of this section, to bargain collectively is the performance of the obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith

with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewithin notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a pe-

riod of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

* * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8 (b) (4) (B) the terms "any employer," "any person engaged in commerce or an industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided, further*, That the bargaining representative has been given opportunity to be present at such adjustment.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(e) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or

agency, at a place therein fixed, not less than five days after the serving of said complaint: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary cir-

cumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification in section 1254 of title 28.

APPENDIX B

The following table of exhibits referred to in the Board's brief is presented pursuant to Rule 18(f) of the Rules of the Court. References are to the type-written transcript of record ("Tr.") :

GENERAL COUNSEL'S EXHIBITS

| <u>Number</u> | <u>Identified</u> | <u>Offered</u> | <u>Received in Evidence</u> |
|---------------|-------------------|----------------|-----------------------------|
| 2 | 16 | 16 | 16 |
| 4 | 19 | 19 | 19 |
| 5 | 21 | 21 | 21 |
| 6 | 22 | 22 | 22 |
| 7 | 22 | 22 | 22 |
| 8 | 25 | 25 | 25 |
| 9 | 26 | 26 | 26 |
| 10 | 27 | 27 | 27 |
| 12 | 28 | 28 | 28 |
| 14 | 30 | 30 | 30 |
| 16 | 33 | 33 | 33 |
| 17 | 34 | 34 | 34 |
| 24 | 129 | 129 | 129 |
| 25 | 133 | 133 | 133 |

RESPONDENT'S EXHIBIT

| | | | |
|---|-----|-----|-----|
| 3 | 155 | 155 | 155 |
|---|-----|-----|-----|

No. 20,760

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WAYNE JOHNSON, An Individual, d/b/a
CARMICHAEL FLOOR COVERING Co.

and

JOHN DUNCAN, An Individual, d/b/a
DUNCAN FLOOR Co., RESPONDENTS

BRIEF OF RESPONDENTS

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FILED

JUL 21 1966

FEB 14 1967

WM. B. LUCK, CLERK

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DUNCAN FLOOR Co., RESPONDENTS

BRIEF OF RESPONDENTS

I.

STATEMENT OF THE CASE

At the hearing of this matter before the Trial Examiner and in this proceeding, it has been, and is, the contention of Respondents that at the time the present dispute arose Respondents ceased to be employers as defined in the collective bargaining agreement and, therefore, were no longer subject to the provisions of that agreement. It is, therefore, the contention of Respondents that the findings of the Board are based upon a misinterpretation of the facts of the case. In that regard Respondents concede that had they remained "employers" as defined in the

collective bargaining agreement they would have been in violation of the agreement.

The collective bargaining agreement recognizes two classifications of employers. In the collective bargaining agreement (G.C. Exh. 17) two classifications of employers are defined. In paragraph 11 a Fair Employer is defined as one who, among other things, has "\$1,000.00 in stock", and, in addition, employs members of the Union for installation of this stock. The second classification is Labor Contractor, defined as one who fabricates and installs floor coverings.

From the testimony adduced at the hearing before the Trial Examiner, it is recognized that there are at least three classifications of businesses directly involved in the field, with which we are concerned. The first classification would be retail sales operations which sell various types of floor coverings but which do not hire installation employees but, instead, employ labor contractors for installation. The second classification would be retailers who hire their own employees for installation. The third classification are the labor contractors who install for the retailers mentioned as the first classification. (Tr. 88-89.)

II

ARGUMENT

A.

THE PROHIBITION AGAINST SUBCONTRACTING APPLIES ONLY TO LABOR CONTRACTORS.

It has been the contention of the Board throughout the proceedings in this case that the words mentioned

in paragraph 12 of the agreement are binding upon Respondents. The pertinent provisions of paragraph 12 are as follows: "Employer agrees to refrain from contracting out unit work now being performed by his employees covered by this contract."

This clause is contained in paragraph 12 which, by its heading, is entitled "Labor Contractors". The evidence is replete with testimony that both of the Respondents were engaged in business as retailers and installers of floor coverings prior to the dispute here in question.

While negotiations for a new working agreement were in progress, the Union brought about a dispute over the right of an employer of the classification of Respondents to subcontract installation work, apparently on the contention that the cited provision of section 12 hereinabove was a prohibition which applied to Respondents. This dispute was never completely resolved but the Union persisted in its contention that an employer of the classification of Respondents would not be permitted to subcontract installation work.

B.

RESPONDENTS HAD A RIGHT TO CEASE BEING EMPLOYERS.

Because of the contention of the Union that they could not subcontract work otherwise done by their employees, both Respondents decided to cease being employers. The decision of Duncan was due, in part, to ill health. (Tr. 137.) Respondent Carmichael Floor Covering Co. decided to cease being an employer be-

cause of a decrease in work and an inability to maintain a regular full time working staff of employees. (Tr. 157-158.)

At the time of the signing of the 1963 agreement by other members of the employer association, both Respondents notified the Union that they were discontinuing "their operations as employing contractors" and would not be parties to the new agreement. Thereupon, both Respondents ceased to employ any members of the Union in their business activities, completely terminated installation of floor coverings and Respondent Carmichael disposed of all its installation equipment. Immediately after termination of their installation businesses both Respondents employed labor contractors who were parties to collective bargaining agreements with the Union.

C.

THE CONDUCT OF RESPONDENTS WAS NOT AN UNFAIR LABOR PRACTICE.

The determination of the Trial Examiner that the refusal of Respondents to sign the collective bargaining agreement constituted an unfair labor practice is not supported by the evidence. It is only reasonable that an employer must have the right to discontinue a particular business enterprise at his own discretion. Regardless of the nature of his difficulties in the particular enterprise, he cannot be compelled by anyone to remain in business against his wishes.

In the particular case at hand, each of the employers had come to the determination that he would

not remain in the installation business. Both employers felt constrained to remain in the retail sales end of the floor covering business and have done so. Both employers have done this with the intention of employing subcontractors for installation without any intention of damaging the Union or its membership.

The decision of the Trial Examiner in the present matter would seem to hold that it is an essential requirement that an employer bargain collectively with a Union concerning the decision of the employer to discontinue being an employer. We can comprehend no justification for such a requirement.

Additionally, there is no evidence in the present case of any refusal to bargain on the issue of cessation of employment, if this be construed to be an issue. Respondent Duncan discontinued his installation operation because his workers quit. (Tr. 109.) Respondent Carmichael sold his installation equipment to a new Union labor contractor. (Tr. 159-160.) Having discontinued operations in the installation field neither Respondent remained an employer and, therefore, neither was any longer a member of an association of employers and neither was any longer affected by a collective bargaining contract.

It is the contention of both Respondents that the holding in *Textile Workers Union v. Darlington*, 58 LRRM 2657 is complete authority for their position. Respondents contend that they have an absolute right to bring about a partial termination of business in any field in which they had previously been occupied so long as the termination is not motivated by an

intent to harm unionism. The Trial Examiner dismisses this contention with the statement that "The charge in the instant case, however, relates solely to Respondents' statutory duty to bargain." If the ruling of *Textile Workers Union v. Darlington* is correct and if, in fact, Respondents are no longer employers, there is no issue concerning refusal to bargain or statutory duty to bargain. Nowhere is there a statutory duty for an employer to bargain concerning terminating his own business.

Dated, Sacramento, California,

July 21, 1966.

Respectfully submitted,

CLIFFORD R. LEWIS,

Attorney for Respondents.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLIFFORD R. LEWIS,

Attorney for Respondents.

In the United States Court of Appeals
for the Ninth Circuit

No. 20760

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WAYNE JOHNSON, An Individual, d/b/a
CARMICHAEL FLOOR COVERING Co.

and

JOHN DUNCAN, An Individual, d/b/a
DUNCAN FLOOR Co., RESPONDENTS

On Petition for Enforcement of an Order of the
National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR
RELATIONS BOARD

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FILED

AUG 15 1966

WM. B. LUCK, CLERK

FEB 1 1967

**In the United States Court of Appeals
for the Ninth Circuit**

No. 20,760

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WAYNE JOHNSON, An Individual, d/b/a
CARMICHAEL FLOOR COVERING Co.

and

JOHN DUNCAN, An Individual, d/b/a
DUNCAN FLOOR Co., RESPONDENTS

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**REPLY BRIEF FOR THE NATIONAL LABOR
RELATIONS BOARD**

I.

Respondents contend, relying solely on *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, that their conduct could not have constituted unfair labor practices since, by contracting out their instal-

lation work, they ceased to be employers subject to the Act (Resp. Br. 3-6). This contention is without merit. Unlike *Darlington*, where the plant in question was permanently closed and plant operations were completely abandoned, both respondents in the present case continued as business entities. Both respondents continued selling floor covering materials and merely contracted out their installation work. The record does not show how many salesmen, office personnel, or other employees remained on respondents' payrolls. It does show, however, that Duncan continued to employ a bookkeeper and office manager (Tr. 95.) Duncan continued to make bids and contracts for a total price, including the cost of both material and installation (Tr. 67, 112-113). Johnson was interested in having his installing contractors use employees with whom Johnson was familiar and also cosigned a note to enable one of his contractors to purchase equipment (Tr. 161-162).

Neither does the *Darlington* case support respondents' assertion of "an absolute right to bring about a partial termination of business in any field in which they had previously been occupied . . ." (Resp. Br. 5-6). In *Darlington, supra*, at p. 268, the Supreme Court stated:

We hold that so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his *entire* business for any reason he pleases, but disagree with the Court of Appeals that such right includes the ability to close *part* of a business no matter what the reason. [Emphasis supplied.]

Moreover, the Court specifically distinguished and approved those cases where (as here) part of a business is closed "but the work is continued by independent contractors." 380 U.S. 272-273, n. 16.

While the statute does not state the specific characteristics of an "employer," it does state that the term "employee" includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice" (Sec. 2(3)). Accordingly, respondents' terminated installation workers remained employees within the statutory definition and their statutory employment relationship *vis-a-vis* respondents did not cease.¹

II.

Respondents' contention that the collective bargaining agreement did not forbid them to contract out installation work urges an irrelevancy. The Board found that respondents committed unfair labor practices by refusing to be bound by the agreement and by unilaterally contracting out work without bargaining with the Union. Whether or not respondents' conduct violated the collective bargaining agreement was not an issue before the Board. There may have been a dispute, as respondents contend, over the ap-

¹ See *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 190-192; *Bon Hennings Logging, Co. v. N.L.R.B.*, 308 F. 2d 548, 555-558 (C.A. 9); *N.L.R.B. v. Hunter Engineering Co.*, 215 F. 2d 916, 921 (C.A. 8); *Old King Cole, Inc. v. N.L.R.B.*, 260 F. 2d 530, 531-532 (C.A. 6).

plicability of the agreement's provisions against contracting out. Respondents, however, refused to be bound at all by the collective bargaining agreement, which included procedures for the settlement of disputes (G.C. Ex. 17, p. 9). Thus, it was respondents' repudiation of the agreement reached through collective bargaining and their circumvention of the collective bargaining process, not their violation of the terms of the agreement, which constituted respondents' unlawful refusals to bargain.

III.

The Board's rules for withdrawal from multi-employer bargaining, discussed at pp. 10-16 of our main brief, were recently approved again by the Second Circuit in *Publishers' Association v. N.L.R.B.*, decided July 25, 1966, 62 LRRM 2722.

CONCLUSION

For the reasons stated here and in our main brief, we respectfully submit that a decree should issue enforcing the Board's order in full.

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CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF
AMERICA, LOCAL 1281, AFL-CIO, RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 20,761

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF
AMERICA, LOCAL 1281, AFL-CIO, RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for enforcement of its order issued against the respondent on May 17, 1965, pursuant to Section 10(c) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et seq.).¹ The Board's Decision and

¹ The pertinent statutory provisions are reprinted, *infra*, pp. 28-30.

Order (R. 30-40)² are reported at 152 NLRB No. 48. This Court has jurisdiction of the proceeding under Section 10(e) of the Act, the unfair labor practices having occurred at Anchorage, Alaska, within this judicial circuit. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly stated, respondent (hereinafter "the Union") and Raber-Kief, Inc. (hereinafter "Raber-Kief" or "the Company") had an agreement pursuant to which the Company hired carpenters exclusively through the Union's hiring hall. The Board found that, by refusing to refer Ivan DiBoff for employment with the Company because of DiBoff's protected activities, the Union attempted to cause, and did cause the Company to discriminate against DiBoff in violation of Section 8(a)(3), and the Union thereby violated Section 8(b)(2) of the Act. The Board also found that, by this conduct, the Union had restrained and coerced DiBoff and the employees of the Company in the exercise of rights guaranteed by Section 7, and had thereby violated Section 8(b)(1)(A) of the Act. The facts upon which the Board's findings rest are summarized below.

² References to the pleadings reproduced as "Volume I, Pleadings" are designated "R." References to the stenographic transcript of the hearing reproduced pursuant to Court Rule 10 are designated "Tr." References to the General Counsel's exhibits are designated "G.C. Exh." Whenever a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

A. The exclusive hiring hall agreement

The Union (as a member of the Alaska State Council of Carpenters) and the Company (as a member of the Alaska Chapter, Associated General Contractors of America) were parties to a collective bargaining agreement in effect at all times material here (G.C. Exhs. 2(a) and 2(b)). The agreement contained an exclusive hiring hall clause³ which provided for the referral of qualified carpenters from two lists. List No. 1 consisted of men who either had been residents of the Union's jurisdictional area for the preceding year or had worked within the Union's jurisdictional area in each of the preceding 2 years (R. 31; G.C. Exh. 2(a), p. 5, Tr. 12-15). List No. 2 consisted of all other qualified applicants (R. 31; G.C. Exh. 2(a), p. 5). The agreement (R. 31; G.C. Exh. 2(a), Article III, Section 3(c), p. 4) gives a job preference to carpenters on List No. 1 except that an employer

... may employ one carpenter out of each eight carpenters without regard to the said preference. Of the first eight carpenters employed on each job one may be the exception, thereafter the exception shall be only after seven other carpenters are employed. This ratio of List No. 1 to List No. 2 Carpenters will not be exceeded at any stage or period of [a] project.⁴

³ The term "non-exclusive" in Art. III, Sec. 3(a) of the agreement (G.C. Exh. 2(a), p. 3) is a typographical error. It should be read "exclusive" and is uniformly so understood by all affected parties (R. 31; Tr. 11, 12, G.C. Exh. 15, p. 1).

⁴ The validity of these provisions is not at issue here.

When an employer makes an "open request" for carpenters (i.e., a general request for carpenters not specified by name), carpenters are referred in the order of the placement of their names on the two "out-of-work" lists. List No. 2 carpenters are not referred until all names on List No. 1 have been exhausted (R. 31; Tr. 22, 283). When an employer specifically requests a List No. 1 carpenter by name, that carpenter is entitled to immediate referral regardless of his placement on the "out-of-work" list. An employer's request for a specific List No. 2 carpenter is likewise honored, unless the one-to-seven ratio precludes such referral (R. 31; Tr. 16, 26-27, 284).

A request by an employer for a particular carpenter can be made either by a direct communication from the employer to the Union or through the employee involved. If a carpenter comes into the hall and states that he was sent by a specific employer to pick up a referral slip to go to work for that employer, such a request is treated by the Union as a specific request by that employer for that carpenter by name (R. 31; Tr. 25-26).

During the period from May to September 1963, Raber-Kief with its joint venturers⁵ was engaged in

⁵ The Union, on the trial of this case, raised the issue of whether Raber-Kief or another of its joint venturers was the actual employer at the Monta-Vista Project, since the complaint related only to the Union's refusal to refer DiBoff for employment with Raber-Kief (Tr. 169-180, R. 5-6). However, the Union conceded that it had always dealt with Raber-Kief as the employer at Monta-Vista (Tr. 262, G.C. Exh. 15, p. 3); the issue was not raised before the Board;

the construction of the Monta-Vista Housing Project (hereinafter "the Monta-Vista Project" or "Monta-Vista") in Anchorage, Alaska (R. 31; Tr. 262).⁶ Beginning in July 1963, Raber-Kief with its joint venturers was engaged in construction, pursuant to a contract with the United States Navy, on Adak Island in the Aleutian Islands (hereinafter "the Adak Project" or "Adak") (R. 33; Tr. 58, 290-291).⁷ The Company hired all of its carpenters at both projects through the Union's hiring hall (Tr. 279).

B. *The Union's discriminatory refusal to refer Ivan DiBoff for employment with Raber-Kief at both Monta-Vista and Adak*

Ivan DiBoff, a carpenter by trade, is a member of the Union and has worked in its jurisdictional area for many years (R. 31; Tr. 70-71, 266). In November 1961, DiBoff left Alaska for Hawaii to work on one specific project and did not return to Alaska until May 1963 (R. 31; Tr. 267-270).⁸ Upon his return,

and the Board, in agreement with the Trial Examiner, found that Raber-Kief was the actual employer at Monta-Vista (R. 31-32).

⁶ At various times during the trial, this project was also referred to as the "Mountain View Project."

⁷ The record is unclear whether the joint venturers on the Adak Project were the same as those on the Monta-Vista Project. However, the Union did not raise the issue of Raber-Kief's status as employer on the Adak Project (see n. 5, *supra*, R. 8, G.C. Exh. 15, p. 3) and the Board, in agreement with the Trial Examiner, found that Raber-Kief was the actual employer at Adak (R. 33).

⁸ Unless otherwise indicated, all dates refer to 1963.

DiBoff registered with the Union and was placed on List No. 1 (R. 31; Tr. 47, 184-186). When the matter came to the attention of Union Business Agent Robert Powell, Powell removed DiBoff's name from List No. 1 and placed it at the bottom of List No. 2, since DiBoff was not a resident of Alaska and had not worked in the Union's jurisdictional area in both of the preceding 2 years (R. 31; Tr. 47-48).⁹

In early June, DiBoff asked George Woodward, the Company's foreman at Monta-Vista, for a job. Woodward told DiBoff that he could start to work as soon as he got a referral from the Union (R. 31-32; Tr. 74, 112-113).¹⁰ DiBoff then went to the Union hall and told Powell that he had a job waiting for him

⁹ Originally the Union's financial secretary had determined that DiBoff should be placed on List No. 1 since (1) he had worked continuously in the State of Alaska since the late 1920's or early 1930's; (2) he had only temporarily left Alaska and intended to return; (3) he did not establish an official residence in Hawaii; and (4) he had in fact returned to Alaska to work (Tr. 184-186). On the other hand, Powell asserted that DiBoff was a resident of the State of Washington (where he owned a home occupied by his wife) and placed his name on List No. 2 (Tr. 47-48). It was not contended before the Board that either Powell's removal of DiBoff's name from List No. 1 or Powell's placement of DiBoff's name at the bottom of List No. 2 (possibly below the names of other carpenters who had signed up after the time that DiBoff originally signed on List No. 1) was motivated by improper considerations.

¹⁰ DiBoff's immediate employment was not contemplated at that time because DiBoff preferred to await the arrival of his tools, which were then being shipped to Alaska, and Woodward had no urgent need for him at that time. However, Woodward told DiBoff that he could start work as soon as his tools arrived (Tr. 112-113).

with the Company if he could get a referral (R. 32; Tr. 76-77). Powell refused to give him a referral on the ground that DiBoff was a List No. 2 man (R. 32; Tr. 76). After subsequent frequent visits to the hiring hall proved equally fruitless, DiBoff reported to Woodward that he was unable to get a referral (R. 32; Tr. 113).

On or about June 23, Woodward made a telephone request to the Union for the referral of DiBoff, Narvald Osnes, and Torstein Nicolaysen, which request was denied on the ground that all three of them were on List No. 2 (R. 32; Tr. 114).¹¹ Woodward then took the three men to the Union hall, where Powell asserted that he could not dispatch List No. 2 men because the ratio of List No. 1 men to List No. 2 men on the Monta-Vista Project would not permit it (R. 32; Tr. 114). Urgently needing carpenters, Woodward then made an "open request" (R. 32; Tr. 115). Pursuant to this request, Powell, between June 24 and June 30, referred eight or nine carpenters to Woodward, including one List No. 2 carpenter, Ashjarn Saelvik (R. 32; G.C. Exhs. 6 and 7, p. 3).¹²

¹¹ So far as the record shows, this was the first direct communication from the Company to the Union requesting DiBoff's referral. Woodward in early June asked Link Morse, then the Company's superintendent at Monta-Vista, to specifically request DiBoff's referral. However, there is no evidence that Morse ever made such a request (R. 31-32; Tr. 113).

¹² Aldrich, Qualls, Sherrin, McDonald, Cloe, Saelvik, Alexander, Green, and Pendergrass (G.C. Exh. 6, pp. 20-22).

G.C. Exh. 6 is the payroll record for carpenters employed at Monta-Vista during the relevant period. It is composed

Some of these carpenters, including Saelvik,¹³ proved to be incompetent and were laid off on June 28 (R. 32; G.C. Exh. 6, p. 22, Tr. 115). When Saelvik was referred to the Company on June 26, the Monta-Vista quota of List No. 2 men had already been filled (R. 32; G.C. Exhs. 6 and 7).¹⁴

About July 1, Powell asked Woodward to hire a List No. 1 carpenter, Abe Hansen, who Woodward did not think was the right man for the job (R. 32; Tr. 115-116). Powell said that if Woodward would put Hansen to work, he would refer either Osnes or Nicolaysen, both No. 2 men whom Woodward had unsuccessfully requested the week before (R. 32; Tr. 116-117). Woodward refused but said he would put Hansen to work if Powell referred both Osnes and Nicolaysen (R. 32; Tr. 117). This in fact was done.

of 30 pages consecutively numbered 1-30 in red in the lower right hand corner of each page. The pages are not in chronological order.

¹³ The Board concluded that Saelvik had not been specifically requested and was terminated for incompetency (R. 32), in view of Woodward's testimony that some of the carpenters referred pursuant to his "open request" had to be laid off for incompetency (Tr. 115); Saelvik's termination after 2 days, although carpenters were then needed and being hired; the fact that only one other carpenter was laid off during this period (G.C. Exh. 6, pp. 20-22), and the fact that Woodward made his specific requests on the basis of others' recommendations (R. 33-34; Tr. 111). See *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 800.

¹⁴ On June 26, there were 20 carpenters employed at Monta-Vista (G.C. Exh. 6, pp. 20-22). Four of them (Harrington, Jacob Morken, Wood, and Saelvik) were List No. 2 men (G.C. Exh. 7, p. 3). The Company, at that time, was entitled to only three List No. 2 men.

On July 2, Powell referred Osnes when the Monta-Vista quota of No. 2 men was already filled (R. 32; G.C. Exhs. 6 and 7, Tr. 117).¹⁵ On July 3, when Powell referred Hansen and Nicolaysen, the number of List No. 2 carpenters on that project was two in excess of the permissible quota ¹⁶ (R. 32; G.C. Exhs. 6 and 7, Tr. 118). A day or two after Hansen and Nicolaysen were referred, Powell told Woodward that he was over his limit of List No. 2 men, but that if Woodward would agree to keep the men he already had, there would be no problems (Tr. 118-119).

In the latter part of July, Raber-Kief began hiring carpenters for the Adak Project (R. 33; Tr. 291). On Woodward's recommendation, the Company's Office Manager, Louis Taylor, placed a request for DiBoff which was denied by Powell on the ground that DiBoff was not on List No. 1 (R. 33; Tr. 290-291).¹⁷ In an attempt to secure referral, DiBoff made

¹⁵ On June 2, there were 22 carpenters employed at Monta-Vista (G.C. Exh. 6, pp. 23-25). Four of them (Harrington, Jacob Morken, Wood, and Osnes) were List No. 2 men (G.C. Exh. 7, p. 3). The Company, at that time, was entitled to only three List No. 2 men.

¹⁶ On July 3, there were 24 carpenters employed at Monta-Vista (G.C. Exh. 6, pp. 23-25). Five of them (Harrington, Jacob Morken, Wood, Osnes, and Nicolaysen) were on List No. 2 (G.C. Exh. 7, p. 3). The Company, at that time, was entitled to only three List No. 2 men.

¹⁷ The Adak and Monta-Vista Projects were entirely separate for hiring purposes, and each was required to adhere to its own one-to-seven ratio (Tr. 24-25). However, the Monta-Vista Project was a "proving ground" for carpenters later transferred to Adak (Tr. 24). Thus, Woodward recommended to Taylor certain carpenters for hire at Adak.

frequent visits to the Union hall, which visits produced no results until about September 10 (a week after the Union was served with the charge in this case), when DiBoff was referred to the Adak Project (R. 33; 3, Tr. 49-50, 186-187, G.C. Exh. 1(b)).¹⁸ After DiBoff had been initially denied a referral to the Adak Project, three List No. 2 carpenters were referred to the project at times when Adak's quota of such carpenters had already been filled (R. 33; G.C. Exhs. 5(a), 5(b), 7 and 8).¹⁹

¹⁸ DiBoff was dispatched at the specific request of Lloyd Cleveland, the office manager in Anchorage for the Adak Project (Tr. 140). At the time of DiBoff's dispatch, the Adak quota of List No. 2 men had already been filled. On September 10, there were 26 carpenters at Adak (G.C. Exh. 5(a), pp. 31-33, G.C. Exh. 5(b)). Five of them (DiBoff, Wood, Wymer, Vosberg, and O'Shaughnessy) were on List No. 2 (G.C. Exh. 7, pp. 2-3, G.C. Exh. 9). Thus, since the Company was entitled to only four List No. 2 men, DiBoff's referral to Adak was itself in disregard of the ratio.

G.C. Exh. 5(a) and 5(b) are the payroll records for carpenters employed at Adak during the relevant period. G.C. Exh. 5(a) is composed of 43 pages, consecutively numbered 31-73 in red in the lower right hand corner of each page. G.C. Exh. 5(b) is composed of two unnumbered pages. The pages of neither exhibit are in chronological order.

¹⁹ These were Wood, O'Shaughnessy, and Wymer. More specifically:

1. On July 30, there were eight carpenters at Adak (G.C. Exh. 5(a), pp. 64-66). Two of them (Wood and Vosberg) were on List No. 2 (G.C. Exh. 7, p. 3, G.C. Exh. 9). The Company, at that time, was entitled to only one List No. 2 man.

2. On August 13, there were 16 carpenters at Adak (G.C. Exh. 5(a), pp. 55-58). Three of them (O'Shaughnessy, Wood, and Vosberg) were List No. 2 men (G.C.

While Woodward did not specifically request DiBoff for work at Monta-Vista after June 23, his reason for not doing so was that he "was resigned to the fact that [DiBoff] was not going to be sent to the job," since DiBoff had told him "many times that he couldn't get" a referral slip (R. 33; Tr. 125). Taylor requested DiBoff for work at Adak in July, again in August,²⁰ and a couple of other times (R. 33-34; Tr. 290-292). After Taylor "had been definitely turned down and gave up hope of getting a dispatch" for DiBoff, he told DiBoff that "it was just a waste of my time and his time coming in to see me" (R. 34; Tr. 293). Taylor "told DiBoff if he could get Mr. Powell to call [Taylor] and dispatch [DiBoff], [Taylor] would send him to Adak" (Tr. 293). During this entire period, DiBoff appeared at the Union hall almost daily seeking a referral for employment with the Company (Tr. 49-50, 186-187) and Powell knew that the Company had a "continual request" for DiBoff's services (Tr. 186-187).

Exh. 7, pp. 2-3, G.C. Exh. 9), while the Company was entitled to only 2 List No. 2 men.

3. On August 20, there were 22 carpenters at Adak (G.C. Exh. 5(a), pp. 49-53). Four of them (Wymer, Wood, Vosberg, and O'Shaughnessy) were on List No. 2 (G.C. Exh. 7, pp. 2-3, G.C. Exh. 9), while the Company was entitled to only 3 men on List No. 2.

²⁰ Thus, Taylor called Business Agent Powell to request DiBoff immediately after Taylor received a letter from the Union's financial secretary that, pursuant to the August 12 decision of the Union's executive board, DiBoff would be dispatched (R. 33; Tr. 193, 291). The membership refused to ratify the board's action, and DiBoff was not dispatched (see pp. 15-16, *infra*).

During the entire period from early June to September 10, Powell refused every request by Woodward, Taylor, and DiBoff for a referral of DiBoff to Raber-Kief on the ground that DiBoff was on List No. 2 and the ratios at both Adak and Monta-Vista would not permit such a referral (R. 34; Tr. 76-77, 114, 292). Yet, after the initial requests for DiBoff's referral had been denied on that ground, eight or nine other List No. 2 carpenters were referred to the Company in disregard of the ratio and when the Company's quota of List No. 2 carpenters had already been exhausted (R. 34; G.C. Exhs. 5(a), 5(b), 6, 7, 9, Tr. 37).²¹ Other List No. 2 carpenters were re-

²¹ These are as follows:

On the Adak Project, Wood, O'Shaughnessy, and Wymer (see n. 19, pp. 10-11, *supra*).

On the Monta-Vista Project, Saelvik (see n. 14, p. 8, *supra*), Osnes (see n. 15, p. 9, *supra*), Nicolaysen (see n. 16, p. 9, *supra*), Bert Harrington, Jacob Morken, and Donald Freeberg.

Bert Harrington was referred to Monta-Vista on June 13 in disregard of the ratio, as there were 12 carpenters on the job (G.C. Exh 6., pp. 14-16) of which 3 (Woodward, Wood, and Harrington) were on List No. 2 (Tr. 37, G.C. Exh. 7, p. 3) at a time when the Company was entitled to only 2 List No. 2 men.

Jacob Morken was referred to Monta-Vista on June 21 in disregard of the ratio, since there were 15 carpenters on the job (G.C. Exh. 6, pp. 17-19) of which 4 (Woodward, Wood, Harrington, and Jacob Morken) were List No. 2 men (Tr. 37, G.C. Exh. 7, p. 3) while the Company was entitled to only 2 List No. 2 men. It should be noted that Woodward's status as a List No. 2 man ceased on June 24 when he was promoted to the position of superintendent at Monta-Vista (Tr. 37, G.C. Exh. 6, pp. 17, 20).

Donald Freeberg was referred to Monta-Vista on

ferred to Monta-Vista pursuant to an "open request," although Raber-Kief's specific request for DiBoff's referral was still pending (R. 33-34; Tr. 283).²² Moreover, when DiBoff was finally referred to the Adak Project in September, his referral was in disregard of the ratio (G.C. Exhs. 5(a) and 5(b)).²³

C. *Business Agent Powell's hostility to Ivan DiBoff because of his protected activities*

The genesis of Powell's hostility to DiBoff was an incident which occurred on a construction project at

August 20 (G.C. Exh. 6, p. 10). While Freeberg was not on either list, the Board inferred that he was a List No. 2 man (R. 35) because (1) Powell admitted that he did not know what Freeberg's status was, and although Powell could have checked his records, he failed to do so (R. 35; Tr. 37); and (2) Powell testified that at one point after the middle of July, he had exhausted the names on List No. 1 and had to refer List No. 2 men to Monta-Vista (Tr. 283) and Freeberg was the only man, not on List No. 1, hired at Monta-Vista after Nicolaysen was hired on July 3 (G.C. Exh. 6).

At the time of Freeberg's referral, the Monta-Vista quota of List No. 2 men was well over the one-to-seven ratio, since of the seven carpenters (not including Freeberg) employed (G.C. Exh. 6, p. 10), three of them (Osnes, Nicolaysen, and Jacob Morken) were on List No. 2 (G.C. Exh. 7, p. 3).

²² Saelvik on June 26 (see n. 14, p. 8, *supra*) and Freeberg on August 20 (see n. 21, pp. 12-13, *supra*). The Board found that Freeberg was not specifically requested (R. 33-34) in view of Powell's testimony that when he exhausted List No. 1, he referred List No. 2 men to Monta-Vista (Tr. 283) and the absence of evidence that Freeberg was specifically requested.

²³ See n. 18, p. 10, *supra*.

St. Paul's Island in 1960 (R. 35; Tr. 56-57, 86-88).²⁴ DiBoff allegedly violated the Union's jurisdictional rules by having a laborer move some material (R. 35; Tr. 56, 87, 100, 194-195, 237). The job steward called a carpenters' meeting and the Union's members on the job voted that DiBoff be removed from his job. Only the project manager's refusal to remove DiBoff saved his job (R. 35; Tr. 87-88). When Powell later arrived at the island, he reprimanded DiBoff for "not standing up to the Carpenters' jurisdiction" (R. 35; Tr. 56, 195, 237).

In June of 1963, the Union held an election for a business agent and Powell was a candidate. Because of certain irregularities, a rerun election was held in August 1963 (R. 35; Tr. 57-58). In both elections, DiBoff openly, "very vigorously and severely" campaigned against Powell, telling everyone that Powell "was not man enough for the job" (R. 35; Tr. 58, 85, 199-200). DiBoff "pulled no punches" while campaigning and his part in the campaign was "common knowledge" of which Powell was "well aware" (R. 35; Tr. 199-200).

²⁴ While this incident occurred approximately 3 years prior to the Union's refusal to refer DiBoff, DiBoff left for Hawaii immediately after the St. Paul Project was completed (Tr. 269-270) and did not return until May of 1963 (R. 31; Tr. 267). Significantly, Powell, during the summer of 1963, repeatedly raised this incident as a reason for his opposition to DiBoff, e.g., in his conversation with another employer's construction superintendent (Frank Skinner) in August 1963 (Tr. 99-100), and at the Union's general membership meeting on August 19, 1963 (Tr. 194-195, 237, 245-246).

When DiBoff was unable to get a referral to the jobs here involved, he contacted the International headquarters of the Union in July 1963 and made repeated complaints to the National Labor Relations Board in July and August (R. 35; 3, Tr. 78, G.C. Exh. 10, 11, 12, 13). DiBoff showed his correspondence with the International Union to other Union officials (Tr. 198-199, 244-245) and Powell knew that such correspondence had taken place (Tr. 84, 199). On one occasion around the end of July, Powell acknowledged receipt of a letter from the International Union, remarked to DiBoff: "You think this is going to help you?" (R. 35; Tr. 84, 86), and told DiBoff to "go to hell" (Tr. 84). Powell also learned, at least by August 12, that DiBoff had complained to the Board about his inability to get dispatched (R. 35; Tr. 244-245).

Finally, when DiBoff failed to get a referral to Raber-Kief, he took his case to the Union's executive board at a meeting held on August 12, shortly before the rerun election for the office of business agent (R. 36; Tr. 188, 244-245). Business Agent Powell, although not a member of the executive board, attended the meeting and spoke out against DiBoff (R. 36; Tr. 245-246). The executive board decided unanimously, in view of DiBoff's "union background and age," to reverse Powell's action, to grant DiBoff "special dispensation,"²⁵ and to dispatch him to any

²⁵ The use of the term "special dispensation" in the Executive Board's motion was to satisfy Powell. It was a matter of expediency to help Powell save face and to sell the idea to Powell more readily (Tr. 201-202). The motion was

job for which he was requested (R. 36; G.C. Exh. 14, Tr. 189). The next day the Union's financial secretary wrote a letter to Taylor of Raber-Kief advising that DiBoff would be dispatched at any time it was so desired (R. 36; Tr. 193-194, 291). Nothing came of this because the executive board's action was reversed at the August 19 general membership meeting of the Union (R. 36; Tr. 194, 245), at which Powell was very "vindictive" and spoke "violently" against DiBoff because of the St. Paul Island incident in 1960 (R. 36; Tr. 194-195, 237).

Powell admitted that DiBoff made him "temporarily angry" (R. 36; Tr. 55) and stated "I am not very happy with DiBoff because of the way he insulted me all summer and because of the lengths to which he went to get dispatched" (R. 36; G.C. Exh. 15, p. 3). Financial Secretary Lannen "pleaded" with Powell to dispatch DiBoff (R. 36; Tr. 196). Powell replied at one point that he "was not going to dispatch the old son-of-a-bitch, he was on List No. 2 regardless" (R. 36; Tr. 196). Powell demonstrated "great dislike" for DiBoff (R. 36; Tr. 197) and Lannen thought that Powell and DiBoff "would come to blows several times there" when DiBoff asked to be dispatched (R. 36; Tr. 197). To Frank Skinner, a supervisor for Wedekind Construction Company, who asked for DiBoff's referral to his project, Powell stated that he did not "give a damn if [DiBoff] ever goes to work" (R. 36; Tr. 98-100).

made as an "appeaser" to accommodate everyone, to satisfy the desires of all present and yet to place DiBoff on the job (Tr. 252-253).

II. The Board's conclusions

The Board found that the Union's alleged reason for denying the requests for DiBoff's referral to Raber-Kief (i.e., that his referral was not warranted under the one-to-seven ratio governing the referral of List No. 2 carpenters) was "not borne out by the record" (R. 36). The Board also found that "far from strictly enforcing this rule, the Union frequently waived it with respect to other List No. 2 carpenters" (R. 36). The Board was "convinced that the real reason for the discriminatory treatment accorded to DiBoff is to be found in DiBoff's union activities which incurred Powell's enmity and disapproval" (R. 37). The Board then concluded "[a]s the Respondent attempted to cause, and did cause Raber-Kief, Inc., to discriminate against DiBoff in violation of Section 8(a)(3), the Respondent thereby violated Section 8(b)(2) of the Act. By thus attempting to cause and causing Raber-Kief to discriminate against DiBoff, the Respondent also has restrained and coerced DiBoff and the employees of Raber-Kief, Inc., in the exercise of rights guaranteed by Section 7 of the Act, and has thereby violated Section 8(b)(1)(A) of the Act" (R. 38).

III. The Board's order

The Board's order (R. 39-40) requires the Union to cease and desist from causing or attempting to cause the Company to deny employment to, or in any other manner to discriminate against, Ivan DiBoff in violation of Section 8(a)(3) of the Act, or from

denying a referral to, or in any other way discriminating against, Ivan DiBoff for engaging in activities as a Union member, or from in any like or related manner restraining or coercing the Company's employees in the exercise of their statutory rights. Affirmatively, the Union is required to notify the Company that it has no objection to the continued employment of DiBoff, to make DiBoff whole for loss of wages, and to post appropriate notices.²⁶

SPECIFICATION OF POINT RELIED ON

Substantial evidence on the record considered as a whole supports the Board's finding that the Union refused to refer employee DiBoff to the Company because of his intraunion activities, in violation of Section 8(b)(2) and (1)(A) of the Act.

ARGUMENT

Substantial Evidence On The Record Considered As A Whole Supports The Board's Finding That The Union Refused To Refer DiBoff For Employment With Raber-Kief Because Of His Intraunion Activities, In Violation Of Section 8(b)(2) And (1)(A) Of The Act

A. Introduction and controlling principles

A union and an employer can, of course, lawfully agree to an exclusive hiring hall, requiring an applicant for employment to obtain union clearance as a condition to employment, provided that the hiring hall

²⁶ The backpay period begins on the date of DiBoff's first request for referral to Raber-Kief's Monta-Vista Project, and terminates on the date of his referral to Raber-Kief's Adak Project (R. 39).

is operated on a non-discriminatory basis.²⁷ However, it is well established that a union violates Section 8(b)(2) and (1)(A) of the Act, where, in administering an exclusive hiring hall, it refuses to refer an employee for the purpose of punishing or retaliating against him for engaging in activity protected by Section 7 of the Act.²⁸ Section 7 protects the right of a union member to abstain from all union activities, including adherence to union rules;²⁹ his right to seek to alter the manner in which his union's

²⁷ *Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 365 U.S. 667; *N.L.R.B. v. International Union of Operating Engineers Local 12*, 323 F. 2d 545 (C.A. 9); *N.L.R.B. v. Tom Joyce Floors, Inc.*, 353 F. 2d 768, 769-771 (C.A. 9).

²⁸ *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17, 25-26, 40-42; *Lummus Co. v. N.L.R.B.*, 339 F. 2d 728, 733-735 (C.A. D.C.); *N.L.R.B. v. Local 490, International Hod Carriers*, 300 F. 2d 328, 332 (C.A. 8); *N.L.R.B. v. Local 138, Operating Engineers*, 254 F. 2d 958 (C.A. 2), enforcing *per curiam* 118 NLRB 669; *Local 138, Operating Engineers v. N.L.R.B.*, 321 F. 2d 130, 136-137 (C.A. 2); *N.L.R.B. v. International Longshoremen's and Warehousemen's Union*, 210 F. 2d 581 (C.A. 9); *N.L.R.B. v. International Union of Operating Engineers, Local 12*, 237 F. 2d 670, 674 (C.A. 9), cert. denied, 353 U.S. 910. See also, *N.L.R.B. v. Waterfront Employers*, 211 F. 2d 946 (C.A. 9); *N.L.R.B. v. Local 507, International Hod Carriers*, 336 F. 2d 460 (C.A. 9), enforcing *per curiam*, 140 NLRB 1090; and *N.L.R.B. v. Hod Carriers, Local 300*, 336 F. 2d 459 (C.A. 9), enforcing *per curiam*, 128 NLRB 971 and 134 NLRB 1768.

²⁹ *Radio Officers, supra*, 347 U.S. at 40, 42; *N.L.R.B. v. Reed*, 206 F. 2d 184, 189 (C.A. 9); *N.L.R.B. v. Local 490, International Hod Carriers*, 300 F. 2d 328, 332 (C.A. 8); *N.L.R.B. v. Local 65, Carpenters*, 318 F. 2d 419 (C.A. 3), enforcing *per curiam* 135 NLRB 574, 577.

affairs are administered (whether by expressing dissatisfaction with local union officials, protesting their policies to the International, seeking to compel a change in their methods of running the union, or seeking to effect their removal by election or otherwise);³⁰ and his right to complain to the National Labor Relations Board about his union's refusal to refer him.³¹

The Board found in the instant case that the "real reason" for Business Agent Powell's refusal to refer DiBoff for employment with the Company in the summer of 1963 was "DiBoff's union activities which incurred Powell's enmity and disapproval" (R. 37). Because the Union and the Company were admittedly parties to an agreement which required such referral as a condition of hire, the Board's conclusion and order are plainly proper if substantial evidence on the whole record supports the Board's finding of

³⁰ *Lummus Co. v. N.L.R.B.*, 339 F. 2d 728, 733-734 (C.A. D.C.); *Brewers & Maltsters Local 6 v. N.L.R.B.*, 301 F. 2d 216 (C.A. 8), enforcing 128 NLRB 294, 305; *N.L.R.B. v. Local 138, Operating Engineers*, 254 F. 2d 958 (C.A. 2), enforcing *per curiam*, 118 NLRB 669; *Local 138, Operating Engineers v. N.L.R.B.*, 321 F. 2d 130 (C.A. 2); *N.L.R.B. v. Bechtel Corp.*, 328 F. 2d 28 (C.A. 10); *Flack v. N.L.R.B.*, 327 F. 2d 396 (C.A. 7); *N.L.R.B. v. Machinists Local 504*, 203 F. 2d 173 (C.A. 9); *N.L.R.B. v. Aurora City Lines*, 299 F. 2d 229, 231-232 (C.A. 7); *N.L.R.B. v. Nu-Car Carriers*, 189 F. 2d 756, 760 (C.A. 3), cert. denied, 342 U.S. 919.

³¹ *Local 138, Operating Engineers v. N.L.R.B.*, 321 F. 2d 130, 136 (C.A. 2); *Bordas & Co. v. N.L.R.B.*, 288 F. 2d 132 (C.A. D.C.), enforcing *per curiam*, 125 NLRB 1335; see also, *N.L.R.B. v. Operating Engineers Local 12*, 237 F. 2d 670, 674 (C.A. 9), cert. denied, 353 U.S. 910.

Powell's improper motivation in refusing to refer DiBoff. The record evidence amply warrants this finding.³²

B. Substantial evidence on the whole record supports the Board's finding that Union Business Agent Powell refused to refer DiBoff to the Company because of DiBoff's protected activities

The evidence summarized in the Statement establishes that, pursuant to an exclusive hiring hall contract, the Company refused to hire any carpenters, including DiBoff, unless they first received clearance from the Union (p. 5, *supra*). Between June 30 and September 10, 1963, through its supervisors Woodward and Taylor, the Company made direct requests to the Union for the referral of Ivan DiBoff to the Monta-Vista and Adak Projects (pp. 6-7, 9-11, *supra*). Both continued unsuccessfully to request DiBoff until they became convinced that further requests would have been futile (p. 11, *supra*).

³² In finding that the Union violated the Act, the Board rejected the Trial Examiner's recommendation that the complaint be dismissed. Since the Board accepted the Trial Examiner's findings on basic facts and since the Board's disagreement with the Trial Examiner involves inferences and questions of law rather than credibility determinations, the Trial Examiner's conclusions are not entitled to special weight. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 494, 496; *Cheney California Lumber Co. v. N.L.R.B.*, 319 F. 2d 375, 377 (C.A. 9); *N.L.R.B. v. Texas Independent Oil Co.*, 232 F. 2d 447, 451 (C.A. 9); *Warehousemen and Mail Order Employees Local 743 v. N.L.R.B.*, 302 F. 2d 865, 866, 869 (C.A.D.C.); *Webb Fuel Co. v. N.L.R.B.*, 308 F. 2d 936, 937-938 (C.A. 6); *International Woodworkers of America v. N.L.R.B.*, 262 F. 2d 233, 234 (C.A.D.C.).

Moreover, beginning in early June and continuing to September, DiBoff appeared at the Union hall almost daily, informing Business Agent Powell that he had a job waiting for him with the Company and requesting a referral (p. 11, *supra*). Notwithstanding the Union's practice of treating such a request as a direct request from the employer for that specific carpenter by name, Powell refused to give DiBoff a referral slip, while at the same time referring to the Company other carpenters who, like DiBoff, were on List No. 2 (pp. 4, 12-13, *supra*).

The Board was well warranted in concluding that Powell refused to give DiBoff a referral slip to retaliate against his protected activities. Powell's refusal to refer DiBoff began immediately after DiBoff's return from Hawaii, where DiBoff had gone immediately after incurring Powell's resentment at his failure, as a member, to observe the Union's work-jurisdiction rules—activity protected by Section 7 of the Act (pp. 13-14, *supra*). After Powell had placed DiBoff on List No. 2, he and DiBoff engaged in many heated arguments, which almost “came to blows,” about Powell's refusal to dispatch DiBoff (p. 16, *supra*). DiBoff openly campaigned against Powell's reelection before both union elections in the summer of 1963 (p. 14, *supra*). DiBoff took his fight with Powell to the Union executive board shortly before the second union election in an effort to discredit Powell and to get a referral to the Company (pp. 15-16, *supra*). DiBoff went to the extreme—in Powell's view—of registering his complaint against Powell with

the International Union President and with the National Labor Relations Board (p. 15, *supra*). Throughout this entire period, Powell steadfastly refused to refer DiBoff for employment (p. 12, *supra*). He fought DiBoff's attempts to get a referral before the Union executive board, before the general membership meeting of the Union, and finally before the President of the International Union, who had investigated DiBoff's complaint (pp. 15-16, *supra*). Not until after the Union had been served with the charges in this case did Powell recant and grant a referral to DiBoff (pp. 9-10, *supra*).

Powell himself summed up his hostility toward DiBoff by stating: "I am not very happy with DiBoff because of the way he insulted me all summer and because of the lengths to which he went to get dispatched" (p. 16, *supra*). As we have shown, such "lengths" involved DiBoff's exercise of his rights under the Act. The inference of unlawful motivation warranted by the evidence summarized above is, moreover, strengthened by the fact that the reasons advanced by the Union for Powell's refusal to refer DiBoff fail to stand under scrutiny (*N.L.R.B. v. Dant*, 207 F. 2d 165, 167 (C.A. 9)).

The Union contended that it failed to refer DiBoff because, after the Company's initial requests for DiBoff's services, the Company's failure to make continual requests indicated a preference for other List No. 2 men. However, Company supervisors Woodward and Taylor testified that they eventually stopped asking Powell to refer DiBoff because they "gave up hope" and were "resigned to the fact" that DiBoff

was not going to be referred (p. 11, *supra*).³³ The Board properly concluded that the Company's failure to make the futile gesture of further repeated requests for DiBoff does not warrant the inference that the Company intended to cancel or revoke its prior requests for DiBoff (R. 34).³⁴ Nor could the Union have inferred any such intention, in view of DiBoff's continued requests for referral to the Company—requests which under the Union's ordinary practice were the equivalent of requests emanating from the Company (pp. 4, 11, *supra*). Moreover, two of the nine List No. 2 men referred while DiBoff was unsuccessfully seeking referral were not specifically requested by the Company,³⁵ whereas DiBoff had been so requested—hardly evidence that the Company had evinced a preference for them over DiBoff. Furthermore, Woodward testified—and his testimony in this respect was credited by the Trial Examiner (R. 23)—that as between DiBoff and two other List No. 2 men referred during this period,³⁶ he “did not prefer any one of the three over the others” (Tr. 126-127). Finally, far from showing a Company preference for

³³ The Trial Examiner, who accepted the Union's contention that the Company had revoked its request for DiBoff, did not mention this testimony (R. 33-34).

³⁴ Cf. *N.L.R.B. v. Machinists Local 504*, 203 F. 2d 173, 176 (C.A. 9); *N.L.R.B. v. Swinerton*, 202 F. 2d 511, 515 (C.A. 9), cert. denied, 346 U.S. 814; *N.L.R.B. v. Waterfront Employers*, 211 F. 2d 946, 953 (C.A. 9).

³⁵ Donald Freedberg (pp. 12-13, n. 21-22, *supra*) and Ash-jarn Saelvik (p. 8, n. 13, *supra*).

³⁶ Osnes and Nicolaysen (pp. 8-9, *supra*).

the remaining List No. 2 men referred during this period,³⁷ the record contains no evidence about the circumstances surrounding their referral. In sum, there is no record evidence that the Company ever canceled its request for DiBoff, or that the Union believed it had. Indeed, the Company hired DiBoff as soon as he obtained a referral slip.³⁸

The Board was also warranted in rejecting the contention that Powell refused to refer DiBoff because the Company's contractual quota of List No. 2 carpenters had been filled, and not because of his animus against DiBoff's protected activities. As we have shown on pp. 12-13, *supra*, the Union, in disregard of the contract, referred eight or nine List No. 2 men to the Company (some of whom it had not specifically requested by name) during the summer of 1963, when DiBoff was unsuccessfully seeking referral. The record contains no reasonable explanation for Powell's strict enforcement of the contract against DiBoff alone, other than Powell's resentment at DiBoff's exercise of his statutory rights.³⁹ Because

³⁷ Wood, O'Shaughnessy, Wymer, Bert Harrington, and Jacob Morken (see n. 21, p. 12, *supra*).

³⁸ In any event, as the Board pointed out (R. 34), the Union's denial of the Company's original request, being unlawfully motivated, makes the Union responsible for all the consequences of its unlawful action even assuming that the Company's failure to renew the request amounted to a revocation. Cf. *N.L.R.B. v. Sunrise Lumber & Trim Corp.*, 241 F. 2d 620, 625, (C.A. 2), cert. denied, 355 U.S. 818; *N.L.R.B. v. Interurban Gas Co.*, 354 F. 2d 76, 77 (C.A. 6), enforcing 149 NLRB 567, 578.

³⁹ Although pointing out that at all material times the Company's ratio between List No. 2 men and List No. 1 men

Powell's refusal to refer DiBoff was motivated by improper considerations, it is, of course, immaterial that the contract might have justified Powell's action.⁴⁰

was at maximum or exceeded maximum, the Examiner surmised that this "could" have been caused by an erroneous calculation of the ratio by the Union, the laxity of the Union in adhering to the contract or the knowledge of the Union that more List No. 1 men would be employed in the near future and the ratio would thus be restored (R. 21-22). The Board was warranted in rejecting these speculations. Cf. *N.L.R.B. v. Sun Shipbuilding & Dry Docks Co.*, 135 F. 2d 15, 31 (C.A. 3).

⁴⁰ *Puerto Rico Drydock & Marine Terminals v. N.L.R.B.*, 284 F. 2d 212, 213-215 (C.A. D.C.), cert. denied, 364 U.S. 883; *N.L.R.B. v. Local 369, Electrical Workers*, 341 F. 2d 470 (C.A. 6); *Local 18, Operating Engineers (Earl D. Cregar, Inc.)*, 141 NLRB 512, enforced *per curiam*, March 23, 1965 (C.A. 6, No. 15907). See also, *Wells, Inc. v. N.L.R.B.*, 162 F. 2d 457, 459-460 (C.A. 9); *N.L.R.B. v. Dant*, 207 F. 2d 165, 167 (C.A. 9); *N.L.R.B. v. Texas Independent Oil Co.*, 232 F. 2d 447, 450 (C.A. 9).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

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GREGORY L. HELLRUNG,
Attorneys,

National Labor Relations Board.

April 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.

UNFAIR LABOR PRACTICES

Sec. 8(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation

of subsection (a) (3) or to discriminate against an employee with respect to whom membership, in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary

relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

Pursuant to Rule 18(f) of the Rules of the Court

GENERAL COUNSEL'S EXHIBITSⁱ

| No. | Identified | Offered | Received in Evidence | Rejected |
|------------|------------|---------|-------------------------|----------|
| 1(a)-1(k) | 4 | 4 | 4 | — |
| 2(a)-2(b) | 10 | 10 | 11 | — |
| 3 | 18 | 19 | 19 | — |
| 4 | 20 | 21 | 23 | — |
| 5(a)-5(b)* | 40 | 39 | — | — |
| | | 145 | 151 | — |
| 6* | 40 | 39 | — | — |
| | | 159 | 160 | — |
| 7 | 42 | 44 | 46 | — |
| 8** | 59 | 59 | — | 62 |
| | | 270 | — | 271 |
| 9 | 69 | 68 | 69 | — |
| 10*** | 78 | 79 | — | 81 |
| | | | 84 | — |
| 11*** | 79 | 79 | — | 81 |
| | | | 84 | — |
| 12 | 84 | 83 | 84 | — |
| 13 | 84 | 83 | 84 | — |
| 14 | 191 | 192 | 192 | — |
| 15 | 258 | 255 | 261 | — |

ⁱ References are to the Reporter's stenographic transcript.

* General Counsel's Exhibits 5(a), 5(b), and 6 were originally offered, withdrawn and later reoffered and received.

** General Counsel's Exhibit 8 was twice offered and twice rejected by the Trial Examiner.

*** General Counsel's Exhibits 10 and 11 were originally rejected by the Trial Examiner who later changed his ruling of his own accord without a reoffer.

No. 20,761

IN THE

**United States Court of Appeals
For the Ninth Circuit**

| | |
|--|----------------------|
| NATIONAL LABOR RELATIONS BOARD, | } <i>Petitioner,</i> |
| VS. | |
| UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 1281, AFL-CIO, | |
| | } <i>Respondent.</i> |

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF ON BEHALF OF RESPONDENT
UNITED BROTHERHOOD OF CARPENTERS & JOINERS
OF AMERICA, LOCAL 1281, AFL-CIO

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FILED

JUL 21 1966

WM. B. LUCK, CLERK

FEB 14 1967

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|--|---|
| National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 USC Sec. 151, et seq.): | |
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| Section 10(e) | 1 |

No. 20,761

IN THE

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NATIONAL LABOR RELATIONS BOARD,

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UNITED BROTHERHOOD OF CARPENTERS &

JOINERS OF AMERICA, LOCAL 1281, AFL-CIO,

Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board

**BRIEF ON BEHALF OF RESPONDENT
UNITED BROTHERHOOD OF CARPENTERS & JOINERS
OF AMERICA, LOCAL 1281, AFL-CIO**

I. JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for the enforcement of an order issued against the Respondent, referred to herein also as the Union, on May 17, 1965 pursuant to Section 10(c) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 USC Sec. 151, *et seq.*). The Court has jurisdiction under Section 10(e) of the Act.

The National Labor Relations Board affirmed the rulings of the Trial Examiner, but failed to adopt his recommendation. The Trial Examiner concluded that the General Counsel had failed to sustain the burden of proving that the Union had committed unfair labor practices, and recommended that the complaint be dismissed.

II. ISSUE

The issue is whether or not the Union failed and refused to refer Ivan DiBoff for employment with Raber-Kief, an interstate employer doing construction business in the State of Alaska. The Union contends that DiBoff was not referred because he failed to qualify for referral pursuant to an exclusive referral agreement between the Respondent Union and Raber-Kief.

III. FACTS

The Respondent and the Alaska Chapter of the Associated General Contractors of America have an exclusive hiring agreement providing for the referral of qualified applicants for carpentry work from two lists. List No. 1 consists of men who (a) have been for the preceding year residents of Respondent's jurisdictional area; or (b) have worked in the carpentry trade within Respondent's jurisdictional area in each of the preceding two years. List No. 2 consists of all other qualified applicants. The agreement gives

job preference to employees on List No. 1 with the exception that contractors may employ one carpenter out of each eight carpenters on or qualified for List No. 2 without regard to the said preference. The agreement provides that: "Of the first eight carpenters employed on each job one may be the exception, thereafter the exception shall be only after seven other carpenters are employed. This ratio of List No. 2 to List No. 1 carpenters will not be exceeded at any stage or period of project."

When an employer requests the referral of a List No. 1 carpenter, by name, that carpenter is entitled to referral regardless of his placement on the out-of-work list, and even though his name is not physically on the list. A request for a specific List No. 2 carpenter, by name, is also honored unless the one to seven ratio would preclude the referral of a List No. 2 carpenter, and this is so even though his name is not physically on the list. When the request is not for carpenters, by name, referrals are made in accordance with the numerical order on the out-of-work lists, and in such cases, the List No. 2 is not used until all names on List No. 1 have been exhausted.

A request by an employer for a particular carpenter can be made through the employee himself. This is an expedient that the Union has developed through successful usage.

However, this expedient is extra-contractual, and can be practiced only when such a referral would not be inconsistent with known facts, or a reasonable belief that an employer is not requesting a particular

employee. The record is barren of any support for the existence of such a thing as a "continuing request" for referral. A continuing and specific preference was stated for two employees, Osnes and Nicolaysen, as will be discussed herein.

DiBoff is a man 77 years of age and has worked in the jurisdictional area of Respondent for many years. He was absent from the State of Alaska from November 1961 to May 1963, during which time he was in the State of Hawaii following his trade as a carpenter. He maintains a residence in Edmonds, Washington.

When DiBoff returned to Alaska in May, 1963, he talked with Ben Perkins, Respondent's finance secretary, regarding a referral. Perkins concluded that DiBoff should be placed on List No. 1, and he based this conclusion on the premise that DiBoff did not establish a home in Hawaii. This was not in accordance with the provisions of the hiring hall agreement, and shortly thereafter when the matter came to the attention of Business Agent Robert Powell, he removed DiBoff's name from List No. 1 and placed it on List No. 2. DiBoff's position on List No. 2 was 28th.

Although DiBoff was on List No. 2, he was qualified for referral to an employer if requested by that employer and if the ratio of List No. 2 men to List No. 1 men in the employ of the particular employer did not exceed one to seven. Otherwise, DiBoff would be eligible for referral only after all men on List No. 1 had been offered employment and after those that

preceded him on List No. 2 had been offered employment.

In the early part of June, 1963 DiBoff talked with George Woodward, a foreman on the Monta Vista job of Raber-Kief, regarding employment. Woodward asked Link Morse, the general superintendent on the Monta Vista project, to request that DiBoff be referred by Respondent. DiBoff stated that he wished to use his own tools, which had not arrived in Alaska at that time, and stated that he would be ready to go to work when he received his tools. His tools arrived in the latter part of June, 1963, and from then on DiBoff made frequent visits to the Union hall and to the jobsite seeking employment. *There is no evidence that Morse made a request for DiBoff. Respondent denies receiving a request from Morse, and Morse did not testify.* Woodward could only assume that it was made. Nevertheless, DiBoff communicated to Business Agent Powell that a job with Raber-Kief was waiting for him if he could obtain a referral. This was not true, and could not be proven.

The record establishes that DiBoff was not denied hiring hall privileges. When he registered, he was re-registered on List 2, the proper list. This re-registration is not the subject of this charge. The only basis for asserting an unfair labor practice at this point is if DiBoff had a job and this the General Counsel failed to do. The trier of fact so found and the NLRB had no basis for finding otherwise.

In the latter part of June, 1963, on or about June 23, 1963 Woodward made a telephone request of the

Respondent for three carpenters—DiBoff, Osnes and Torstein Nicolaysen, all List No. 2 carpenters. The request was refused on the grounds that they were List No. 2 men. Woodward testified that he needed these men very badly for the type of work he felt sure they could do, and he took them personally to the Union hall. Powell explained to him that under no circumstances could he dispatch any one of the three because of the fact that Woodward had too many List No. 2 men on the job at the time. Powell had previously dispatched men pursuant to Woodward's request, but some of these had been terminated as incompetent. A few days after the request for DiBoff, Osnes and Nicolaysen, Powell visited the job-site and brought with him a carpenter named Hansen, who was an elderly gentleman. Woodward informed Powell that he could not use Hansen, as the work he then had required younger men who could climb up and down scaffolds. He asked Powell to send out Nicolaysen and Osnes. Powell told him that if he would put Hansen to work, he would send out one of the two younger men. Woodward asked that he send both of them. Powell refused to do this, and that ended their conversation. The next morning Osnes came to the job with a referral slip. Woodward then placed a call for Hansen and Nicolaysen, and these men were dispatched and put to work. It will be recalled that being 77 years old, DiBoff is not a young man.

Following the June 23rd request for DiBoff, Woodward did not again make a specific request for Di-

Boff, but he told DiBoff that any time that he could get a referral slip, he had a job at the Monta Vista project. This is not adequate as a request.

On or about June 23, Woodward was promoted from foreman to general superintendent at the Monta Vista project, succeeding Link Morse.

In the latter part of July 1963, Raber-Kief began hiring carpenters for the Adak project. Louis Taylor, office manager for Raber-Kief was in Anchorage, Alaska, during this time hiring personnel for the Adak project. DiBoff was recommended by Woodward for employment; Taylor placed a request by telephone with Respondent for DiBoff. On another occasion, during this same time, Taylor talked with Powell regarding DiBoff and was told by Powell that he could not be dispatched because he was not on List No. 1. During this time, DiBoff visited both the Union hall and the office of Taylor regarding employment, and Taylor told him that if DiBoff could get Powell to dispatch him, he would send him to Adak.

The Trial Examiner found and concluded that DiBoff was specifically requested for the Monta Vista project on or about June 23, 1963, and for the Adak project during the time carpenters were initially employed for that job, near the end of July, 1963, and that DiBoff continually thereafter made known to Respondent that Raber-Kief desired his employment. The specific requests were turned down by Powell on the grounds that DiBoff was a List No. 2 carpenter and that the ratio of List No. 2 carpenters to

List No. 1 carpenters did not warrant his referral. Respondent further contends that following the specific requests in June and in July DiBoff was not again requested by Raber-Kief until about September 5th or 6th, and that during the interval other men were requested specifically. Pursuant to this request, DiBoff was referred for employment on September 10, 1963 on the Adak project. The period during which he had been requested and not referred was from about June 23, 1963 to September 10, 1963.

Counsel for General Counsel contends that DiBoff continuously made known to Respondent that Raber-Kief requested him and that DiBoff was discriminated against as evidenced by the referral of other List No. 2 men, and that Powell's statements to other persons evidence his animosity for DiBoff as his motive for not referring him.

However, the record is quite clear that during this period the employer was making specific requests for carpenters by name, and never for DiBoff by name. The reason for this, according to the General Counsel's witness and the National Labor Relations Board's decision, was that after the first request for DiBoff, the employer, for reasons of its own, "gave up hope" of getting DiBoff, told DiBoff he was wasting his time, and never requested DiBoff again. The reason for the lack of request was what the employer believed, not what the facts actually were. Nonetheless, regardless of what the reason was, the record is uncontradicted that there was no "continuing request" but quite the contrary—the original re-

quest was rescinded and withdrawn because it was erroneously believed to be a waste of time.

Records of Raber-Kief show the following carpenters, who were List No. 2 men, to have been employed on the Monta Vista project from the latter part of June, 1963 to September 10, 1963:

| | |
|----------------------|---------------------|
| June 21 (Friday): | Jacob Morken |
| June 26 (Wednesday): | Ashjarn Saelvik |
| July 2 (Tuesday): | Narvald Osnes |
| July 3 (Wednesday): | Torstein Nicolaysen |

Records of Raber-Kief show that the following carpenters, who were List No. 2 men, were employed on the Adak project from its inception to September 10, 1963:

| | |
|--------------------|----------------------------------|
| June 21 payroll: | Hal Vosberg, foreman |
| August 4 payroll: | Ivan E. Wood |
| August 18 payroll: | Wm. T. O'Shaughnessy, foreman |
| August 25 payroll: | Jay S. Wymer |

Payroll records of Raber-Kief show that at all times material herein the ratio of List No. 2 men to List No. 1 men was at maximum or exceeded maximum. The turnover of employees resulted in frequent changes in the ratio. The termination or quitting of List No. 1 men could cause a ratio-excess of List No. 2 men; also the records indicate that on occasions extra List No. 2 men were employed causing a ratio imbalance at least temporarily. This could be from erroneous calculations of the ratio by Respondent due to the fluidity of the employment situation and re-

quirements, or due to laxity by Respondent in adherence to the 7 to 1 ratio, or due to knowledge by Respondent of impending employment of, or changes in status of, List No. 1 men, which would then bring the ratio into balance.

The records do not indicate at any time a ratio shortage of List No. 2 men in the employ of Raber-Kief. From this there appears to have been no opening for DiBoff. But, as indicated above, some List No. 2 men were referred.

Until List No. 1 is exhausted, a List No. 2 man can get employed only upon specific request of an employer and then only provided the ratio is not exceeded. It can then be concluded, in absence of evidence to the contrary, that the List No. 2 men named above were specially requested by Raber-Kief. There is no testimony regarding the circumstances surrounding the employment of Morken, Saelvik, and Freeberg on the Monta Vista project nor on the four List No. 2 men hired on the Adak job. The fact that Saelvik worked only two days, coupled with Superintendent Woodward's testimony that some unnamed carpenters referred were not competent, and coupled with the continued referral of carpenters, suggests that Saelvik was one of the incompetent referrals; and thus in turn suggests that he may not have been requested by the employer. But such conclusions are mere conjectures and not based on adequate evidence. Counsel for General Counsel did not identify during the hearing the List No. 2 men allegedly referred in preference to DiBoff (except possibly Osnes and Nic-

olaysen). He indicated that an analysis of the payroll record of Raber-Kief and the exhibits showing the list placement of carpenters would reveal List No. 2 men employed by Raber-Kief and their periods of employment. This is quite true, but the payroll records do not reveal the circumstances surrounding the employment of these men. No evidence was elicited from Raber-Kief or the employees involved or from Respondent on this matter, and Respondent, not being informed as to the names of the carpenters allegedly referred in preference to DiBoff, offered no testimony on this matter. Two of the List No. 2 men on the Adak job were foremen and a third, Wood, had worked all season for Raber-Kief on the Monta Vista job. These facts taken from the payrolls would "indicate" an employer preference for these men over DiBoff. As to the fourth, Wymer, employed during the August 25 payroll, there being no testimony as to the circumstances of his employment, this referral was not discriminatory as to DiBoff. The same is true as to Jacob Morken and Ashjarn Saelvik employed June 21 and June 26, respectively, on the Monta Vista job.

Evidence was adduced concerning the referral and employment of Osnes and Nicolaysen, and this is set forth in a prior paragraph. Powell had tried to get Woodward to employ a List No. 1 carpenter, Hansen, on the occasion; but he was rejected primarily because of his physical limitations due to his age. Woodward then urged and bargained with Powell to dispatch two young carpenters, Osnes and Nicolay-

sen. Finally, Powell did send Osnes, and then after a specific request for Hansen and Nicolaysen, they were dispatched the next day.

The case against the Respondent Union is based upon alleged personal animosity between DiBoff and Powell. This stems from an incident in 1960 when DiBoff was reprimanded by Powell for permitting laborers to perform carpenters' work; and from a 1963 incident when DiBoff campaigned against Powell. DiBoff's behavior during the referral incidents angered Powell.

Regardless of Powell's feelings toward DiBoff, Powell was obliged not to discriminate in favor of DiBoff, just as the law required him to not discriminate against DiBoff. The collective bargaining agreement contains a clause (Article V, Section 2) which provides for settlement of disputes by arbitration. A dispute over the hiring hall operation is included, and may be referred to arbitration.

IV. ARGUMENT

A. LACK OF REQUEST FOR REFERRAL OF DiBOFF.

Due to the failure of the General Counsel to produce testimonial or documentary evidence that DiBoff actually had a job offer from Morse, no unfair labor practice may be attributed to the Union's actions in failing to refer DiBoff earlier than June 23, 1966.

The evidence is undisputed that the first specific request for DiBoff was made on June 23, 1963 when

it was made along with a request for two other carpenters. All three were List No. 2 employees, and all three, not just DiBoff, were rejected, since the List No. 1 and List No. 2 ratios did not permit their hire. DiBoff was again requested and rejected in July for the Adak project because of the List No. 2 quota.

Since other List No. 2 carpenters were referred in this time, it is essential to know where DiBoff stood on the list with regard to those who were referred. This is true regardless of whether or not there were more List No. 2 men referred than was warranted by the quota, for if exceptions were made they must have been made on a nondiscriminatory basis. The record offers no support that the other men were referred out of order or bypassing DiBoff.

Therefore, the only theory which the National Labor Relations Board could use it that DiBoff was specifically requested. The record is also of no support to the General Counsel for on the occasions when the employer requested DiBoff it was impossible to send him. The Board, therefore, adopted the General Counsel's theory that the request for DiBoff having once been made, it was "pending" continuously at all times thereafter. The General Counsel, on page 11 of its brief, stated that Powell knew that the Company had a "continual request" for DiBoff, citing the transcript pages 186-187. Those pages contain no evidence competent to support the contention.

The facts negate the contention that the request for DiBoff was pending after having once been made in June. If this is what the employer intended,

why was a second specific request made for him in July? More significant is the fact that as individual openings appeared, other men were specifically requested for each such openings.

Rather than indicating a pending request for DiBoff, this would indicate to any reasonable man that other List No. 2 men were preferred by the employer. A referral of DiBoff under these circumstances of someone else's being specifically requested, would have been in violation of the contract, and possibly the basis of unfair labor practices.

The Board explains this lapse in its theory with the statement that the employer was resigned to the fact that DiBoff would not be referred—*based solely upon what DiBoff had told him*. This is of course a concession that there was no "pending" request for DiBoff. Nonetheless, assuming it is the excuse for failing to renew a request for DiBoff, it is not a legitimate excuse. The Respondent Union cannot be bound by what the employer thought. This impression is the entire basis for the unfair labor practice charge. The record shows that when DiBoff was requested in September, and the ratio permitted it, he was dispatched. The only reason he was not dispatched before that was the lack of a request at an appropriate time. This decision was controlled by the employer, in reliance upon DiBoff's statements.

The legality of the collective bargaining agreement is not in issue here. It is consistent with the National Labor Relations Act to give preference to certain employees over others as long as the basis for the pref-

erance is not upon a protected activity. (*Typographers Local 6* [1961] 133 N.L.R.B. 1052.) The use of Lists No. 1 and No. 2 as a basis for a preference is legal.

The basis for establishing an unfair labor practice in this type of case must be convincing evidence of hostility, coupled with a substantial deviation from a legal hiring hall practice (*Iron Workers, Local 433, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO* [1965], 151 N.L.R.B. No. 113). There is no evidence of a "substantial deviation" in this case. The Union refused to refer a member on the valid ground that there were not sufficient List No. 1 carpenters to justify his referral.

Since this initial request rejection was not unlawful, the alleged unfair labor practice must be premised upon some specific event. But there is no such incident. Later requests did not include DiBoff; in fact, there were named carpenters for each specific opening. The Union could only conclude that DiBoff was not wanted at each of these times. It is contended by the General Counsel that the substantial deviation occurred when other List No. 2 carpenters were dispatched by name in excess of the ratio. As indicated above, the record established by the General Counsel is barren with regard to the employment of all of the List No. 2 people except Osnes and Nicolaysen; this incident involving these two can be the only premise of a charge, yet at this time, if there was a waiver of a ratio, it was not discriminatory as to DiBoff for Osnes and Nicolaysen had been re-

quested by the employer at that time, and DiBoff was not similarly situated with these men. It was incumbent upon the General Counsel to establish a record of discrimination by developing the facts surrounding the hire of the other List No. 2 men. The Court cannot infer that an unfair labor practice has been committed (*Cupples Co. Mfgs. v. NLRB*, 106 Fed 2d 100 [C.A.-8 1939]; *NLRB v. Lion Shoe*, 97 Fed 2d 448 [C.A.-1 1938]).

B. ALLEGED HOSTILITY ON THE PART OF POWELL.

Although it is the fact that passage of time alone will not necessarily eradicate hostility, where three years intervene between incidents, some more tangible evidence of bias is necessary. The first incident occurred in 1960 between the two men; then in 1963 the second incident took place. The second incident seems to have arisen from DiBoff's placement on List No. 2 and his failure to receive preferential treatment. DiBoff complained to the International and campaigned against Powell on a personal basis. Powell's rejoinder was to doggedly maintain that DiBoff properly belonged on List No. 2 with only such rights as are incident to List No. 2. Powell also maintained that there would be no exceptions made for DiBoff. There is no proof that exceptions were made for anyone else (see the discussion of Osnes and Nicolayson, *supra*). The record shows that DiBoff was ultimately referred when the employer did what he should have done long before; he asked for DiBoff

by name. This certainly establishes that the procedures were honored regardless of personal feelings.

Assuming this is not correct, then to commit an unfair labor practice the Union must discriminate against a person for participating in protected activities. The protected activities found by the National Labor Relations Board were the complaint to the International and campaigning against Powell. The record establishes that both of these activities occurred *after* DiBoff failed to get a referral. Therefore, the original refusal to refer could not have been an unfair labor practice, and the decision of the National Labor Relations Board is patently incorrect. This fact also minimizes the likelihood that subsequent refusals were illegally motivated as well.

C. FAILURE OF DiBOFF TO EXHAUST ADMINISTRATIVE REMEDIES.

In the event that a wrong was done to DiBoff or the employer, or they thought one was done, a speedy remedy is contained in the contract in the form of the grievance procedure. This administrative remedy was designed to handle hiring hall problems as well as any other dispute. It would effectuate the policies of the Act to require parties to first resort to the grievance procedure, especially when they are not estopped from filing an unfair labor practice as well. The grievance procedure would permit a Union to rectify an error at the earliest possible opportunity at the least cost and expense to all persons, including the employee.

A hiring hall is extremely complex, especially one servicing many employers, and involving an intricate balance of List No. 1 to List No. 2. It is not difficult to make an error, for employees in the industry, as well as the demand for them, are flexible and transient.

Fairness to the parties necessitates that the parties exhaust this administrative remedy. The cases support this conclusion (*Spielberg Mfg. Co.* [1955] 112 N.L.R.B. 1080).

V. CONCLUSION

There was no unfair labor practice committed in failing to refer DiBoff on the occasion in early June, 1963. No evidence was submitted to prove a request, and the NLRB had no basis for so holding. Subsequent requests for DiBoff could not be honored due to the ratio. Consequently, an unfair labor practice was committed only if a request for DiBoff continued in effect after having once been made. No evidence would substantiate this theory, and the proof would indicate that requests do not continue in effect. The employer requested other persons by name for each vacancy. In fact, the employer testified that he did not request DiBoff because he didn't think he could get him. The basis for this belief comes solely from what he was told by DiBoff. The Union is not responsible for it and cannot be bound by it.

The Court should exercise its independent judgment after a review of this matter and refuse to

order compliance with the Board's order, and dismiss the complaint.

Dated, San Francisco, California,
July 20, 1966.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

VICTOR J. VAN BOURG,
Attorney for Respondent Union.

No. 20761

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF
AMERICA, LOCAL 1281, AFL-CIO, RESPONDENT**

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

The purpose of this reply brief is to correct certain factual misstatements in the Union's answering brief, and to discuss a procedural defense never previously adverted to by the Union and, therefore, not treated in our opening brief.

I

The Union's principal defense to the merits of the Board's unfair labor practice finding is that the Company never made an adequate request for DiBoff's referral. However, the Union's contention in this respect is based upon a series of misconceptions as the record evidence.

1. Thus, the Union contends (Br. p. 3) that while a specific request for a particular carpenter can be

made through the carpenter himself, "this expedient is extracontractual, and can be practiced only when such a referral would not be inconsistent with known facts or a reasonable belief that an employer is not requesting a particular employee." From this, the Union apparently concludes that all "requests" for DiBoff made by the Company—except those made by Woodward on June 23, Taylor in July and Cleveland in September—were somehow defective. However, the Union has neglected to cite any record support for this description of the parties' referral practice—or, indeed, for most of the other factual assertions in its brief.

Moreover, the only record evidence with respect to the procedure of specifically requesting carpenters through the carpenters themselves—namely, the testimony of Business Agent Powell—provides no support for the alleged limitation asserted by the Union. Powell's testimony on this procedure is as follows (Tr. 25-26):

Q. As a matter of practice, how do employers request men from Local 1281, telephone?

A. Sometimes by phone, sometimes in writing, some of the employers designate as per the contract who is entitled to make the request for men, they notify us in writing who is allowed by their company, who is allowed to request men. However, this is not strictly enforced by the employers or by ourselves. We know through practice what we are dealing with, we recognize names over the phone and we know beyond any doubt whether the request is legitimate or not legitimate.

Q. Isn't it also customary to give men dispatch slips who come into the hall and tell you that they have a job opportunity with one employer or another?

A. Yes. If a carpenter comes into the hall and tells me that I was sent in by John Doe to pick up a dispatch to go to work in the morning, we usually know the carpenter and employer and there is no reason, if a man picked up a dispatch and didn't have a job, the employer would send him back to town anyway.

Q. So you normally don't question this practice?

A. We have enough confidence in our men and in most cases the employer, we don't question them usually.

Q. Well, when a man comes in in this situation indicating he has a job with John Doe Construction Company, you treat this as a request by that company for this man by name?

A. That is correct.

Thus there is no foundation for the Union's assertion that since Link Morse (the Company's then superintendent) may not himself have called the Union in early June to ask for DiBoff's dispatch, DiBoff's statement to Powell that he had a job waiting for him with the Company if he could obtain a referral "was not true and could not be proven" (Br. p. 5). The Union's corresponding inference that, therefore, DiBoff was not specifically requested before June 23 is also defective. First, at the hearing Woodward corroborated DiBoff's statements to Powell that the Company (through then foreman—later superintendent—Woodward) had asked DiBoff to obtain a referral slip in early June (Tr. 112-113).

Secondly, this statement by DiBoff to Powell did constitute a specific request by conforming to the established procedure set forth by Powell (Tr. 25-26). Finally, if Powell questioned the "truth" of DiBoff's claim that the Company was requesting him, or if (as the Union suggests) DiBoff's claim was "inconsistent with known facts or a reasonable belief," Powell need only have telephoned the Monta-Vista job to confirm or deny DiBoff's representation. This Powell failed to do. In the alternative, Powell could have dispatched DiBoff since "if a man picked up a dispatch and didn't have a job, the employer would send him back to town anyway" (Tr. 25-26). This Powell likewise failed to do. The record incontrovertibly establishes (as Powell must have suspected) that if Powell had taken either course, the company would have hired DiBoff.

Finally, the Union's additional contention that Woodward's promise of a job to DiBoff if he could get a referral "was not adequate as a request" (Br. p. 7) is irrelevant. Certainly, there is no request when an employer tells a carpenter to pick up a referral slip and go to work. The request occurs when either the employer or the carpenter communicates this fact to the Union (Tr. 25-26). This DiBoff did, in complete conformity to the established procedure, on an almost daily basis for the entire period from early June until September 10 (Tr. 49-50, 186-187). Therefore, the Board properly held that DiBoff had been specifically requested by the Company throughout this entire period.

2. Nor does the record support the Union's further contention (Br. p. 4) that there is no such thing as a "continuing request" for referral, and alternatively that if such a request did exist, there is no "competent" evidence to support the contention that Powell knew of this request (Br. p. 13). On the contrary, the testimony of one of the Union's own officers and agents does substantiate the existence of a "continual request" in this case and Powell's knowledge of this request. Peter Lannen, the Union's Financial Secretary from June 1955 to late August 1963 (Tr. 182), testified that in June 1963, he¹ instructed DiBoff to sign up on List No. 1 (Tr. 183-186); that, as an officer and agent of the Union, Lannen worked full time (eight hours a day, six days a week) at the Union hall during this period (Tr. 186); that, in his official capacity, he handled 25 percent of the dispatches from the hiring hall (Tr. 222-223); that he had knowledge that the Company had a "continual request" for DiBoff from early June through late August 1963 (Tr. 186); that he had spoken to Powell at length on many occasions concerning the matter (Tr. 187, 196-197); and that he was "certain" Powell had similar knowledge of this request (Tr. 187). In addition, Powell himself admitted that DiBoff came into the hall "very frequently" during the summer of 1963 to get a referral to either Monta-Vista or Adak (Tr. 49-50) and likewise admitted that he was "not very happy with

¹ Not Ben Perkins, as the Union erroneously asserts (Br. p. 4).

DiBoff * * * because of the lengths to which he went to get dispatched" (G.C. Exh. 15, p. 3).

Thus, there is "competent" evidence to support the Board's finding that the Company continuously requested DiBoff throughout this entire period and that Powell knew it. Moreover, as shown above, the Company made specific requests through DiBoff in strict accordance with established procedure almost daily throughout this period. Whether there was a series of everyday independent requests or one long "continual" request is immaterial.

3. The Union contends (Br. pp. 8-9) that the Company's "original request was rescinded and withdrawn," since if the Company intended that its original request be continual "why was a second specific request made for him in July?" (Br. p. 14). The short answer to this rhetorical question is that in June the request was made by Woodward for work at Monta-Vista (Tr. 114) and in July the request was made by Taylor for work at Adak (Tr. 290-291).

4. The Union's additional assertion that during this entire period "as individual openings appeared, other men were specifically requested for each such opening" (Br. p. 14) is completely unfounded and unsupported in the record. Union Business Agent Powell specifically testified that at one point in the middle of July he had exhausted the names on List No. 1, and had to refer List No. 2 men to Monta-Vista (Tr. 283). Company Superintendent Woodward testified that after his request for DiBoff had been turned down he made an "open request" for carpenters (Tr. 114). Finally, there is no evidence that any

List No. 2 men, other than Osnes, Nicolaysen and DiBoff, were ever specifically requested by the Company for either Monta-Vista or Adak. In addition, if at any time Powell doubted the truth of DiBoff's claim of a specific request or had reason to believe that the Company had in any way "rescinded and withdrawn" its request, he need only have telephoned Woodward and Taylor to ascertain whether this were true. His failure to do this for a period of more than 3 months—notwithstanding his "very frequent" difficulties with DiBoff—indicates Powell's belief that the Company would confirm DiBoff's claim.²

II

In its defense, the Union for the first time now claims (Br. p. 17-18) that the Board committed error in not requiring that DiBoff "first resort to the grievance procedure" contained in the collective bargaining agreement in effect between the Company and the Union. This argument is defective in several respects.

² There is no record basis for the Union's apparent implication (Br. pp. 6, 11-12) that the Company may have withdrawn its specific request for DiBoff because of his age. Indeed, the testimony of Woodward establishes the opposite conclusion, since he testified that "in carpenters neither age or youth would make any difference" (Tr. 126); that he wanted DiBoff as he was a "finished" carpenter with a reputation for doing good work and being trustworthy (Tr. 111-112); and that "I felt personally that he could do the work" (Tr. 126). As between Osnes, Nicolaysen and DiBoff, Woodward "did not prefer any one of the three over the others" (R. 23; Tr. 126-127). Finally, the Company did in fact hire DiBoff as soon as he obtained a referral slip.

Section 10(a) of the Act provides in relevant part that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise * * *." Thus, the language of the Act itself, as well as the court decisions affirming the Board's interpretation of this Section, makes clear that the jurisdiction of the Board to decide whether unfair labor practices have occurred may not be restricted by the availability of contract procedures for the impartial settlement of disputes, nor by an actual award or decision thereunder.³ As this Court has stated, in the absence of "extraordinary circumstances" the extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's discretion and is not a question for the courts.⁴ The Union has not shown any such circumstances warranting disapproval of the Board's assertion of jurisdiction in the case at bar.

It is true that the Board may on occasion, in the exercise of its discretion, decline to exercise its juris-

³ *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264-265, 267-269; *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 365; *N.L.R.B. v. Walt Disney Productions*, 146 F. 2d 44, 47-49 (C.A. 9), cert. denied, 324 U.S. 877; *Lummus Co. v. N.L.R.B.*, 339 F. 2d 728, 732-733 (C.A.D.C.); *N.L.R.B. v. Thor Power Tool Co.*, 351 F. 2d 584, 587 (C.A. 7); cf. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 101; *Smith v. Evening News Association*, 371 U.S. 195, 197, 198; *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 270-272.

⁴ *N.L.R.B. v. Carroll-Nashund Disposal, Inc.*, 359 F. 2d 779, 780 (C.A. 9). Accord: *Haleston Drug Stores v. N.L.R.B.*, 187 F. 2d 418, 421 (C.A. 9), cert. denied, 342 U.S. 815; *N.L.R.B. v. Harrah's Club*, 62 LRRM 2507, 2508, 53 L.C. para. 11.316 (C.A. 9, No. 20,270, June 14, 1966).

diction with respect to unfair labor practice questions which have been, or could have been, submitted to arbitration under the collective bargaining agreement between the parties, for the purpose of achieving the "desirable objective of encouraging the voluntary settlement of labor disputes." *Spielberg Manufacturing Company*, 112 NLRB 1080, 1082. The Board has done so where there is an outstanding arbitration award and "the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration board is not clearly repugnant to the purpose and policies of the Act" (*Spielberg Manufacturing Company*, *supra* at 1082). The Board has also stated that it may defer to arbitration even though there is no arbitration award, but the parties could invoke the grievance procedure and the existence of the unfair labor practice turns primarily on an interpretation of specific contractual provisions within the special competence of an arbitrator to determine, and comes to the Board in a context that makes it reasonably probable that arbitration settlement of the contract dispute would also put at rest the unfair practice controversy in a manner sufficient to effectuate the policies of the Act. *Cloverleaf Division of Adams Dairy Co.*, 147 NLRB 1410, 1416; *C & S Industries*, 158 NLRB No. 43.⁵ The Board has never "shunned jurisdiction merely because a party had the contractual right to go to arbitration but has never exercised the option." *Aerodex, Inc.*, 149 NLRB 192, 199; *Aetna Bearing Company etc.*, 152 NLRB 845, 851.

⁵ See also, *Crown Zellerbach Corp.*, 95 NLRB 753, 753-754; *Montgomery Ward & Co., Inc.*, 137 NLRB 418, 423.

Since the Union failed to raise this matter at an earlier stage in this proceeding,⁶ there is no evidence in the record to establish that this case falls within either of the two categories mentioned above. Nothing in the record shows that DiBoff actually filed a grievance, or that there is any outstanding arbitration award. Nor does this case fall into the second category, since there is no evidence: (1) that DiBoff had actual knowledge that the grievance procedure existed, *Lummus Company*, 142 NLRB 517, 518 *enf'd.* as to this point, 339 F. 2d 728, 732-733 (C.A.D.C.); (2) that DiBoff, as a "non-employee", could actually file a grievance, *Thor Power Tool Company*, 148 NLRB 1379, 1381, *enf'd.* 351 F. 2d 584 (C.A. 7); (3) that the arbitrator would consider the same issue as that presented to the Board in this case, *Cloverleaf Division of Adams Dairy Co., supra*, and *Thor Power Tool Company, supra*, 148 NLRB at 1389;⁷ and (4) that the arbitrator would award DiBoff backpay and thus restore the *status quo ante*

⁶ Thus, the Union failed to file cross-exceptions as permitted by Section 102.46(e)(h) of the Board's rules and regulations. Cf. *N.L.R.B. v. Ochoa Fertilizer Co.*, 368 U.S. 318; *N.L.R.B. v. Pinkerton's National Detective Agency*, 202 F. 2d 230, 232-233 (C.A. 9); *Local 901, International Brotherhood of Teamsters v. Compton*, 291 F. 2d 793, 796 (C.A. 1).

⁷ The Board found that the Union's refusal to refer DiBoff was unlawful because it was motivated by his intraunion and other protected activities. Since it was unnecessary for the Board to decide whether the refusal to refer him was also a violation of the collective bargaining agreement, the propriety of the Board's decision is in no way affected by the resolution of this issue. Accordingly, this Court's decision in *N.L.R.B. v. C & C Plywood Corp.*, 351 F. 2d 224, cert. granted, April 18, 1966, is irrelevant to the case at bar.

in a manner which would effectuate the policies of the Act, *Thor Power Tool Company, supra*, 148 NLRB at 1390. To accept the Union's argument at this late date, after an extensive hearing and the rendering of a determination, would only promote litigation and prolong the existing labor dispute and thus would not effectuate the policies of the Act.

Moreover, even if there were evidence in the record placing this case in the second category mentioned above, the Board would in all probability have exercised its jurisdiction in this case. The Board has consistently declined to defer to the grievance process where, as here (G.C. Exh. 2(a), pp. 7-8), the grievance would be submitted to a bipartite committee, composed of representatives of the contracting parties who would be arrayed in common interest against the grievant. *Roadway Express, Inc.* 145 NLRB 513, 514, 515. Because a claim of job discrimination effected through an exclusive union hiring hall "inevitably imputes misconduct to the contracting parties (employers, at least indirectly, since the Union acts for the signatory employers in administering the hiring hall provisions) [, such] review provisions could obviously have the effect of placing the [grievant] at the mercy of agents of parties that have a community of interest and are charged, either directly or indirectly, with the misconduct." *Local Union 469, etc. (Associated Plumbing etc. Contractors of Arizona)* 149 NLRB 39, 45-46; *Lummus Company*, 142 NLRB 517, 518, *enf'd.* as to this point, 339 F. 2d 728, 732-733 (C.A.D.C.); *Iron Workers, Local 433, etc. (Kaiser Steel Corporation)* 151 NLRB 1092, 1100.

CONCLUSION

For the foregoing reasons, as well as those stated in our opening brief, it is respectfully submitted that the Board's order should be enforced in full.

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AUGUST 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

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